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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Nominal Respondent,

-and-

DANIEL M. GOTTLIEB,
Real Party in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the crime-fraud exception to the attorney-client privilege, and the work product doctrine, a law firm may properly be required to produce documents reflecting attorney-client communications, and attorney work product, without *in camera* review or other evidence demonstrating that the attorneys were consulted for the purpose of furthering a crime.

2. Whether, under the joint-client exception to the attorney-client privilege, and the attorney work product doctrine, production of documents can properly be required when the party seeking disclosure was never a client of the attorney.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Cadwalader, Wickersham & Taft ("Cadwalader") respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a petition for a writ of mandamus, entered on October 24, 1986.[1]

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[1] Pursuant to Rule 21.1(b), the parties to the proceeding below are as follows:

Allan Carr, Cadwalader, Wickersham & Taft, Daniel M. Gottlieb, Sentinel Government Securities, Sentinel Financial Instruments, SGS, Inc., and Michael M. Senft.

OPINIONS BELOW

The order of the court of appeals denying a writ of mandamus to the Central District of California is set forth in Appendix D, *infra*, p. 9a. The Order denying a petition for rehearing and a rehearing en banc appears in Appendix E, *infra*, p. 10a.

The orders of the Magistrate and of the district court affirming the Magistrate appear in the Appendices A and C, *infra*, pp. 1a, 5a, respectively.

JURISDICTION

The order of the court of appeals denying a writ of mandamus was entered on October 24, 1986. The order denying a rehearing was entered on December 18, 1986. On March 4, 1987, Justice O'Connor entered an order extending the time for filing the petition until April 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In November, 1980, the plaintiff below, Allan Carr ("Carr"), purchased a tax shelter investment in a limited partnership known as Sentinel Government Securities ("SGS"). Thereafter, Carr brought an action in the United States District Court for the Central District of California, seeking to recover damages against SGS, Michael M. Senft ("Senft"), who was a general partner of SGS, Sentinel Financial Instruments ("SFI") and SGS, Inc. (collectively "the Sentinel defendants"). The suit arose out of Carr's purchase of his partnership interest. Carr also named as a defendant Cadwalader, Wickersham & Taft ("Cadwalader"), the law firm retained by Senft and SGS to render professional services and advice. Cadwalader's representation included, among other things, the preparation of a Private Placement Memorandum and a tax opinion letter in connection with Senft's offering of interests in SGS. As against Cadwalader, Carr

alleged federal and state securities law violations and common law claims, and sought compensatory and punitive damages, all based upon Cadwalader's professional advice to Senft and SGS.

A motion to dismiss filed by Cadwalader in the district court was granted in part and denied in part. Cadwalader then, after answering Carr's complaint, filed a third-party complaint for contribution against Carr's tax advisor and business manager, Daniel M. Gottlieb ("Gottlieb").

While issues relating to pleadings in this action were being resolved and before discovery was commenced, Senft and others were indicted and tried in the United States District Court for the Southern District of New York for criminal tax fraud and conspiracy involving Senft's activities in SFI and SGS. Cadwalader was never charged with any crime in connection with its representation of Senft or SGS, nor was Cadwalader accused of any wrongdoing before any regulatory authority or administrative agency. Neither SGS nor SFI were indicted.

In the criminal case, Senft was convicted on certain counts relating to his SFI activities. Senft was *not convicted* on any count involving any wrongdoing concerning investments by plaintiff Carr or any other individual in the SGS partnership (other than Senft). Indeed, although Count 38 of the indictment specifically charged Senft with tax fraud in connection with the very investment by Carr which is the subject of this action, Senft was not convicted on this count.

Senft was convicted on Count 1 of the indictment, a 29-paragraph count which charged a conspiracy to commit tax fraud based upon numerous overt acts by Senft and others between January 1979 and November 1983. Many of the overt acts involved Senft's activities in connection with SFI; others involved only SGS-related activity. Paragraph 22 of Count 1 charged Senft and others with certain overt acts, including the allegation that

they "ceased soliciting additional customers for SFI and created a new limited partnership SGS, of which SFI was a general partner, to market fraudulent tax benefits." The jury convicted on the conspiracy count but, as instructed at the time of trial, the jury need have found only one of the several overt acts charged over the four year period to convict Senft of conspiracy. Hence, there is no showing that Senft was convicted of any offense relating to SGS, or to Cadwalader's representation of SGS. Rather, the jury's verdict, when read in conjunction with the failure to convict on the specific counts relating to SGS, leads to the conclusion that the jury did *not* find true the charges concerning Senft's activities in SGS.

In the present case, third-party defendant Gottlieb, on May 7, 1985, served a request for production of documents on Cadwalader. Gottlieb himself never made an investment with SGS, never purchased an interest in SGS and, consequently, presumably never lost any money as the result of the alleged fraud committed by Senft and other Sentinel defendants. Gottlieb was never a client of Cadwalader; at no time did Cadwalader undertake to render legal advice or services to him.

Gottlieb's request for production of documents sought materials protected by the attorney-client privilege, and the work product doctrine. The requests encompass such matters as all documents (including work papers and notes) relating to "the preparation of the Private Placement Memorandum" (Request No. 22), "any representations made by Sentinel to Cadwalader in connection with the . . . Memorandum" (Request No. 23), "any investigations Cadwalader made of Sentinel at any time" (Request No. 25), and "Any and all documents which Cadwalader received from or transmitted to any person [conceivably including SGS and Senft] in connection with the preparation of the Private Placement Memorandum." (Request No. 7.)

Cadwalader duly raised and preserved objections based on attorney-client privilege and attorney work product.

The request for production was first heard by a magistrate who granted Gottlieb's motion to compel production on twenty-six of the document requests which Gottlieb served on Cadwalader (i.e., request nos. 6, 7, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 36, 37, 38, 39, 40, 41, 42). (App. 2a.) In rejecting Cadwalader's privilege objections, the magistrate based his ruling solely on the grounds of relevance and need (App. 4a):

> Well, it seems to me that the communications are at issue in a lawsuit, and certainly on balancing the need for the information versus the policy behind the privilege that need outweighs the privilege.

At no time did the magistrate review any documents *in camera*, or hear any testimony or take other evidence concerning the documents or the circumstances surrounding Cadwalader's representation of SGS or Senft. The magistrate's order contained no findings of fact or conclusions of law. App. 1a-3a.

Pursuant to Fed. R. Civ. P. 72(a), Cadwalader filed objections to the magistrate's order before the district judge. Cadwalader specifically offered the documents for *in camera* inspection.[2] The district court affirmed the magistrate's order and overruled Cadwalader's objections based on privilege. (App. C, *infra*, pp. 5a-8a.) Even though the district court recognized that the materials sought by Gottlieb were privileged, it nonetheless determined that the privilege was inapplicable. Addressing issues which were not considered by the magistrate, the

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[2] After arguing in its brief before the district court that its "attorney-client privilege objections are well founded . . . as to each of the disputed requests," Cadwalader's counsel stated: "However, should this court desire, Cadwalader is willing to submit the documents for *in camera* review." Memorandum in Support of Cadwalader's Objections to Magistrate Penne's Order, dated November 12, 1985, p. 21.

district court concluded that the crime-fraud exception to the attorney-client privilege or, alternatively, for documents prepared after Carr's purchase, the "joint client" exception to the privilege, justified disclosure to Gottlieb.

On the crime-fraud issue the court concluded (App. 6a):

> Even were the materials sought by third party defendant Gottlieb privileged, the parties seeking discovery need only make a *prima facie* showing in order to invoke the "crime/fraud" exception to the attorney-client privilege. *See, e.g., United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). It is significant in this regard that defendant Michael M. Senft was convicted on a single conspiracy that included both Sentinel Government Securities ("SGS) and Sentinel Financial Instruments ("SFI"), and that he was indicted on a large number of counts related to SGS—including one count based on transactions with the plaintiff. Especially in light of the extent to which the activities of SFI and SGI [sic] were apparently intertwined, the decision of the magistrate is supportable under the crime/fraud exception to the attorney-client privilege. *See generally In re Berkley*, 629 F.2nd 548, 552-55 (8th Cir. 1980).

At no time did the district court review any of the documents *in camera* or receive any testimony relating to Cadwalader's representation of Senft or Senft's purpose in consulting Cadwalader. Rather, it rendered its decision solely on the basis of attorneys' declarations which were devoid of information regarding the circumstances surrounding Senft's engagement of Cadwalader. While the district court noted that Senft had been indicted on the counts relating to SGS and Carr, the court ignored the fact that he had *not* been convicted on these counts. Moreover, the court's conclusion that the activities of SFI and SGS were apparently intertwined, and that for purposes of the crime-fraud exception the criminal ac-

tivity of SFI was the criminal activity of SGS, was wholly unsupported by the conviction in this case, and does not logically support the conclusion reached by the district court that SGS committed a crime or consulted Cadwalader in furtherance thereof.

On June 17, 1986, Cadwalader filed a Petition for a Writ of Mandamus in the United States Court of Appeals for the Ninth Circuit. This Petition was denied on October 24, 1986, by a panel of the Ninth Circuit. The order in its entirety reads as follows (App. 9a):

> The petition for writ of mandamus is denied. Petitioner has not demonstrated that the district court clearly erred in compelling the production of documents.

Cadwalader thereafter petitioned the Ninth Circuit for Rehearing and Suggestion for Rehearing *En Banc*, relying on the attorney-client privilege and the work product doctrine. This was denied on December 18, 1986. App. 10a. Like the district court, the court of appeals never received any document *in camera*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH A DECISION OF THIS COURT AND IS IN DIRECT CONFLICT WITH DECISIONS OF AT LEAST FOUR COURTS OF APPEALS

A. This Court's Decision in Kerr

In *Kerr v. United States District Court*, 426 U.S. 394 (1975), this Court stressed the importance of *in camera* review of documents claimed to be privileged. In a case with strikingly similar facts, the Court in an opinion by Justice Marshall, without dissent, reviewed the Ninth Circuit's denial of a writ of mandamus to compel a district court in California to vacate discovery orders. The district court had, without *in camera* inspection, ordered production of documents claimed to be privileged.

The Ninth Circuit denied a writ of mandamus on the grounds that the privilege had been asserted by one without standing to assert it. This Court determined that the decision of the court of appeals did not foreclose the possibility of *in camera* review in the district court once the privilege was properly asserted. Accordingly, the Court held that the issuance of a writ of mandamus was inappropriate. *Id.* at 404. Although recognizing that *in camera* review, an avenue well short of mandamus, would properly protect the privilege, the Court in *Kerr* stressed the serious consequences "which could flow from an unwarranted failure by the district court to grant those asserting a privilege the opportunity to have the documents reviewed by the trial judge *in camera* before being compelled to turn them over." 426 U.S. at 405. This Court then said (*id.* at 405):

> [I]t would seem that an *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck.

In remanding the case, the Court concluded (*id.* at 406):

> We are thus confident that the Court of Appeals did in fact intend to afford the petitioners the opportunity to apply for and, upon proper application, receive *in camera* review.

In the present case *in camera* review of the documents has been applied for, and denied by decisions of the district court and the court of appeals. The decision below is thus essentially in conflict with this Court's decision in *Kerr*.

B. Decisions of the Courts of Appeals

1. The Second Circuit has decided that the crime-fraud exception to the attorney-client privilege requires some showing that the legal advice was related to criminal activity. *See In re Grand Jury Subpoenas Duces*

Tecum (Corporate Grand Jury Witness), 798 F.2d 32, 33 (2d Cir. 1986), where it held (emphasis added):

> The crime/fraud exception to the attorney-client privilege cannot be successfully invoked merely upon a showing that the client was engaged in criminal activity. The exception applies only when there is probable cause to believe that the *communications with counsel were intended in some way to facilitate or to conceal criminal activity.*

2. The Eighth Circuit adopted a similar rule when it held that the legal advice must be sought in furtherance of, or in relation to, the fraudulent or criminal activity. *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 n.5, 284 (8th Cir. 1984), *certiorari dismissed* under Rule 53, 472 U.S. 1022 (1985). *See* McCormick on Evidence § 95, at 229 (E. Cleary 3rd ed. 1984). Indeed, that court expressly rejected the premise, relied upon by the district court below, that merely because a fraud or crime followed the communication with the attorney, the communication was in furtherance of the fraud.

3. Applying this Court's decision in *Kerr* in a situation like this one, where no opportunity for *in camera* review remained available, the Temporary Emergency Court of Appeals granted a writ of mandamus directing a district court in California to vacate a discovery order and review claims of privilege by an *in camera* review. *United States Department of Energy v. Crocker*, 629 F.2d 1341 (Temp. Em. Ct. App. 1980). The *Crocker* case does not involve the crime/fraud exception to the attorney-client privilege, but it expressly rejected the procedure and legal conclusion relied upon by the district court in this case. It said (629 F.2d at 1344):

> As the transcript of argument reflects, the district judge rejected all of DOE's privilege claims, including . . . the absolute attorney-client privilege, solely on the basis of his acceptance of Berry's claimed

> need, without *in camera* review of any of the assertedly privileged documents.

Under these circumstances, the court in *Crocker* directed the district judge to conduct "an *in camera* inspection of the documents," and "to reject Berry's claim to discovery, on the basis of need, of documents which he finds are protected by the proper assertion of the attorney-client privilege." 629 F.2d at 1345.

4. *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986), is a case much like this one where the district court failed to review the documents *in camera*. The Sixth Circuit reversed this decision. It said (805 F.2d at 168)—

> the district court found that since the government had established a *prima facie* case of a Sherman Act violation, all the documents [in question] were communicated or done in furtherance of that violation. It made this determination without reviewing the documents *in camera*. We find this to be plain error.

It added (*id.*):

> Ordering production *en masse* creates the potential that some material not within the scope of the crime-fraud exception could be ordered produced. For example, merely because some communications may be related to a crime is not enough to subject that communication to disclosure; the communication must have been made with an intent to further the crime.

The court also observed (805 F.2d at 168) that "Every circuit that has considered the crime-fraud exception to a claim of privilege has reviewed the documents *in camera* before deciding whether they should be produced."[3]

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[3] Among the nine cases cited are *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036-39 (2d Cir. 1984) (court of appeals reviewed documents *in camera*); *In re Grand Jury Proceedings (FMC Corporation)*, 604 F.2d 798, 800 (3d Cir. 1979) (district court reviewed the documents *in camera*); *In re Special September*

Even the decision cited by the district court below involved a situation where the district and appellate courts examined documents *in camera* and found *prima facie* evidence that the attorney was involved in illegal conduct. *See In re Berkley & Co., Inc.*, 629 F.2d 548 (8th Cir. 1980).

II. THE DISTRICT COURT'S EXTENSION OF THE "JOINT-CLIENT" EXCEPTION TO PARTIES WHO WERE NOT CLIENTS OF THE ATTORNEY WAS AN ABUSE OF DISCRETION

The district court clearly erred in ordering production based upon the joint-client exception to the attorney-client privilege.[4] *First*, it was Gottlieb, and Gottlieb alone, who sought discovery from Cadwalader. Gottlieb has never been, nor does he ever claim to have been, a client of Cadwalader. Gottlieb never invested in SGS and never became a limited or general partner of SGS, Cadwalader's client. Petitioner is aware of no case in which a third party, with no attorney-client or fiduciary relationship with the attorney, has been permitted to avail himself of the joint-client exception to the privilege.

Second, even if Carr had sought discovery from Cadwalader, he too could not properly rely on the joint-client exception. Carr was not a client of Cadwalader's in any capacity other than as a limited partner of SGS, Cadwalader's client. Carr had no confidential relation-

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1978 Grand Jury, 640 F.2d 49, 58 (7th Cir. 1980) (*in camera* review by both district court and court of appeals).

[4] The district court found that the joint-client exception applied only to those matters dating from after Carr's purchase of a partnership interest in SGS. At least as to those documents which predate Carr's investments, the joint-client exception is not an alternative ruling and if the crime-fraud exception is inapplicable, a major portion of Cadwalader's client documents remain protected by the privilege.

ship with Cadwalader that was in any way joint with SGS or Senft. All legal assistance rendered by Cadwalader was rendered to and paid for by SGS and Senft. Thus, Carr did not have any attorney-client relationship with Cadwalader which could support invocation of the joint-client exception.[5]

The District court's finding of a joint client exception based on *Quintel Corp. v. Citibank, N.A.*, 567 F. Supp. 1357 (S.D.N.Y. 1983) (*Quintel-I*"), is without basis in light of a later decision by the same court in *Quintel Corp. v. Citibank, N.A.*, 589 F. Supp. 1235 (S.D.N.Y. 1984) (*"Quintel II"*). Relying upon Ethical Consideration 5-18 of the New York Code of Professional Responsibility, the court in *Quintel II* held that a limited partner is *not* a client of the attorney representing the partnership or the general partners.[6] Cadwalader owed no attorney-client duties to Carr and thus had no confidential relationship with him. Thus there was no basis for requiring production of documents under the joint-client exception.

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[5] *See United States v. Parker*, 58 A.F.T.R.2d 86-5367 (E.D. Pa. 1986). An attorney's representation of a partnership does not create an attorney-client relationship between the individual limited partners and the attorney. *See Hoiles v. Superior Court*, 157 Cal. App. 3d 1192, 204 Cal. Rptr. 111 (1984); *Standing Committee on Discipline v. Roth*, 735 F.2d 1168, 1172 (9th Cir.), *cert. denied*, 469 U.S. 1081 (1984); *Koehler v. Pulvers*, 606 F. Supp. 164 (S.D. Cal.), *aff'd*, 614 F. Supp. 829 (S.D. Cal. 1985); Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 235-36 (1986).

[6] Ethical Consideration 5-18 provides that:

> [A] lawyer employed or retained by a corporation or *similar entity* owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, *or other person connected with the entity.*

N.Y. Jud. Law, Code Prof. Resp. E.C. 5-18 (emphasis in original). *Accord Mikropul Corp. v. Desimone & Chaplin-Airtech, Inc.*, 599 F. Supp. 940 (S.D.N.Y. 1984).

III. THE DECISION BELOW IS ERRONEOUS, AND, IF ALLOWED TO STAND, PRESENTS A SERIOUS THREAT TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

1. The so-called "crime-fraud" exception to the attorney-client privilege goes back to *Alexander v. United States*, 138 U.S. 353 (1891); its scope is summarized in this Court's decision in *Clark v. United States*, 289 U.S. 1 (1933). Referring to the privilege protecting communications between attorney and client, Justice Cardozo said:

> The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.

Id. at 15. Stressing the need for evidence that the privilege in fact had been abused, Justice Cardozo continued:

> "It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud." . . . To drive the privilege away, there must be "something to give colour to the charge;" there must be "*prima facie evidence that it has some foundation in fact.*" . . . When that *evidence* is supplied, the seal of secrecy is broken.

Id. (citations omitted; emphasis added).

The burden on the party seeking to pierce the privilege is two-fold. *See In re International Systems and Controls Corporation Securities Litigation*, 693 F.2d 1235, 1242 (5th Cir. 1982). *First*, there must be a *prima facie* showing of a crime or fraud sufficiently serious to defeat the privilege. *Second*, "the court must find some valid relationship between the [privileged communication] . . . and the prima facie violation." *Id. Accord, In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re John Doe Corp.*, 675 F.2d at 482, 491-91 & n.7 (2d Cir. 1982); *Lemelson v. Bendix Corp.*, 104 F.R.D. 13, 16 (D. Del. 1984).

2. The record here contains no evidence from which the district court could reasonably have determined that Senft engaged in criminal behavior relating to SGS, the entity about which he consulted Cadwalader. Given the jury's failure to convict Senft on any of the specific counts of the indictment relating to investors in SGS, the reasonable interpretation of the conviction on the conspiracy count is that the conviction related solely to SFI. As to SGS, the district court's reliance on the indictment, without more, clearly was insufficient to make the *prima facie* showing that the client was engaged in criminal activity related to the representation. *United States v. Dyer*, 722 F.2d 174, 178 (5th Cir. 1983) (to defeat the privilege, government "may not rest on an indictment.").

The record also is devoid of any evidence from which the district court could have concluded that the activities of SGS and SFI were so intertwined that when Senft consulted Cadwalader about SGS he was actually seeking advice for SFI. (Indeed, the indictment itself alleged that in 1980 Senft formed SGS and that he consulted with Cadwalader in connection with the SGS offering.) Finally, the district court also ignored the fact that SGS was not indicted or charged with any criminal conduct, and that any privileged communication relating to SGS (as distinct from communications with Senft) thus cannot be subject to disclosure under the crime-fraud exception.

3. Even if a sufficient showing had been made to demonstrate that Senft had engaged in criminal conduct relating to SGS, the district court gave no consideration to the *second* prerequisite of the crime-fraud exception—the showing that the client consulted the attorney *in furtherance of* a crime or a fraud. This separate, second showing is necessary to avoid wholesale abrogation of the attorney-client privilege merely because the client engaged in some criminal activity which may (or may not) be related to the representation. Without such a

showing, there is no basis to assume that the attorney was consulted in furtherance of that crime. Unless this Court directs enforcement of this essential element of the crime-fraud test, the clear precedent emerging from this case is that there is no privilege for *any* communication between a client and his attorney who was consulted during a period in which the client, at any time, engaged in criminal conduct.

Several methods were available by which the district court could have discerned whether communications with counsel, or counsel's work product, were intended to facilitate criminal activity. Clearly, an evidentiary hearing or at least affidavits detailing the circumstances surrounding the representation would have been appropriate. At minimum, the district court should have reviewed the documents themselves as the starting point for determining SGS' purposes in consulting Cadwalader.

IV. MANDAMUS IS APPROPRIATE SINCE DENIAL OF IMMEDIATE REVIEW AND DISCLOSURE OF THE PRIVILEGED DOCUMENTS WILL RENDER ANY SUBSEQUENT REVIEW MEANINGLESS

This Court has frequently indicated that mandamus, although an exceptional remedy, should be used where there is a clear error in the court below, and where a later appeal is clearly an inadequate remedy. *See Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943). Mandamus is appropriate where, as here, petitioner has shown that its right to the issuance of the writ is "clear and indisputable." *United States v. Duell*, 172 U.S. 576, 582 (1899).

If the district court's order stands, Cadwalader will be prohibited throughout the course of this litigation from claiming privilege as to any document which reflects communications between the law firm and its two clients, or its work product on the matter. Unlike the situation

in *Kerr v. United States District Court, supra,* 426 U.S. 394, no opportunity for *in camera* review remains available. Rather the clear decision of the courts below is that Cadwalader is now foreclosed from seeking *in camera* review of any of the privileged documents. Once the documents are disclosed the privilege is broken. No subsequent appellate process can correct the error.

CONCLUSION

A writ of certiorari should be granted to review the decision of the court of appeals of the Ninth Circuit. The Court may feel that this is an appropriate case for a grant of certiorari, with summary reversal based upon this court's reasoning in *Kerr v. United States District Court,* 426 U.S. 394 (1975).

Respectfully submitted,

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April, 1987

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: C 83-7340 (WDK(Px)

ALLAN CARR,

Plaintiff,

v.

SENTINEL GOVERNMENT SECURITIES, a New York limited partnership; SENTINEL FINANCIAL INSTRUMENTS, a New York general partnership; SGS, INC., a Connecticut corporation; MICHAEL M. SENFT; CADWALADER, WICKERSHAM & TAFT, a New York general partnership,

Defendants.

AND RELATED CROSS ACTIONS

ORDER RE GOTTLIEB'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

[Filed Oct. 31, 1985]

The Motion of Third-Party Defendant Daniel M. Gottlieb to Compel Production of Documents came on regularly for hearing on September 30, 1985, the Honorable James J. Penne, United States Magistrate, presiding. Robert A. Merring, a member of Cutler and Cutler, a Professional Law Corporation, appeared on behalf of plaintiff Allan Carr and third-party defendant Daniel M. Gottlieb, and Pamela M. Woods of Paul, Hastings, Janof-

sky & Walker appeared on behalf of defendant and third-party plaintiff Cadwalader, Wickersham & Taft ("Cadwalader").

Having considered Gottlieb's Request for Production of Documents, dated May 17, 1985, Cadwalader's Response to the Request for Production, the evidence presented, the points and authorities submitted by the parties, and the oral arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. Cadwalader's objections to Gottlieb's Requests Nos. 1, 2 and 3 on the ground of overbreadth are sustained, and the motion as to these three requests is denied without prejudice.

2. Gottlieb's Motion to Compel Production of Documents responsive to Requests Nos. 30, 31, 32 and 33 is denied.

3. Gottlieb's Motion to Compel Production of Documents responsive to Requests Nos. 6, 7, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 36, 37, 38, 39, 40, 41 and 42 is granted, and Cadwalader shall produce said documents no later than one week prior to the scheduled commencement of the depositions of Cadwalader's attorneys in November 1985.

4. Cadwalader shall provide Gottlieb with a verified response indicating those documents which it has actually produced in response to the Request for Production.

5. Gottlieb's request for sanctions and Cadwalader's counter-request for sanctions are denied.

DATED: October 31, 1985

/s/ James J. Penne
THE HONORABLE JAMES J. PENNE
United States Magistrate

SUBMITTED BY:

OLIVER F. GREEN, JR.
DOUGLAS C. CONROY
PAMELA M. WOODS
PAUL, HASTINGS, JANOFSKY & WALKER

By: _____
Attorneys for Defenant
CADWALADER, WICKERSHAM & TAFT

APPENDIX B

EXTRACT FROM DECLARATION OF PAMELA M. WOODS FILED IN THE UNITED STATES DISTRICT COURT, BEING A TRANSCRIPT OF THE HEARING BEFORE MAGISTRATE PENNE ON SEPTEMBER 30, 1985

* * * *

Ms. Woods: [Counsel for Cadwalader] Since they've instructed us to . . . assert it on their behalf, I would like to be able to give them an explanation of why it does not apply.

Magistrate Penne: Well, it seems to me that the communications are at issue in a lawsuit, and certainly on balancing the need for the information versus the policy behind the privilege, that the need outweighs the privilege.

Ms. Woods: Your Honor, it is my understanding that that sort of weighing goes only to the attorney work product and not to the attorney-client privilege.

Magistrate Penne: Well, isn't the work product privilege a little tighter privilege than the attorney-client? You've got to do some weighing, and what you say is true, you use it in your work product, but work product is supposed to be even a more strict privilege than the attorney-client.

Ms. Woods: I guess I would respectfully disagree with the Court on that issue.

Magistrate Penne: Mr. Merring? Any comment?

Ms. Woods: I don't recall any citations cited by Mr. Merring for that balancing process.

Magistrate Penne: Well, I think there's . . . I think it's an issue. As I understand this lawsuit, these communications are very definitely at issue, have been placed at issue by both parties.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-7340-WDK (Px)

ALLAN CARR,

Plaintiff,

v.

SENTINEL GOVERNMENT SECURITIES, *et al.*,

Defendants.

ORDER RE OBJECTIONS TO MAGISTRATE'S ORDER

[Filed Mar. 5, 1986]

This matter is before the Court for consideration of the objections of defendant and third party plaintiff Cadwalader, Wickersham & Taft to Magistrate Penne's Order Re: Gottlieb's Motion to Compel Production of Documents. Having considered the submitted materials, the Court hereby ORDERS that the Magistrate's order is AFFIRMED. This order is based on the following considerations:

1. Upon the timely filing of objections to a magistrate's order on nondispositive matters, the Court "shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law." F.R. Civ. P. 72(a); *see generally* 28 U.S.C. Section 636(b)(1)(A) (providing for designation of magistrates to hear and determine pretrial matters, with reconsideration by

the district court of any ruling shown to be "clearly erroneous or contrary to law"). "Moreover, in resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused." *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979). The order at issue herein was not "clearly erroneous or contrary to law," and it is, therefore, AFFIRMED.

2. Even were the materials sought by third party defendant Gottlieb privileged, the party seeking discovery need only make a *prima facie* showing in order to invoke the "crime/fraud" exception to the attorney-client privilege. *See, e.g., United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). It is significant in this regard that defendant Michael M. Senft was convicted of a single conspiracy that included both Sentinel Government Securities ("SGS") and Sentinel Financial Instruments ("SFI"), and that he was indicted on a large number of counts related to SGS—including one count based on transactions with the plaintiff. Especially in light of the extent to which the activities of SFI and SGI were apparently intertwined, the decision of the magistrate is supportable under the crime/fraud exception to the attorney-client privilege. *See generally In re Berkley*, 629 F.2d 548, 552-55 (8th Cir. 1980). Alternatively, the magistrate's ruling is supportable based on the "joint client exception" to the attorney-client privilege, at least as to materials dating from after the plaintiff's purchase. *See Quintel Corp., N.V. v. Citibank, N.A.*, 567 F. Supp. 1357 (S.D.N.Y. 1983).

3. The work product doctrine applies only to materials "prepared in anticipation of litigation or for trial . . . ." F.R. Civ. P. 26(b)(3). It certainly is not clearly erroneous or contrary to law to conclude that the documents requested in the present case do not fit this description. *See, e.g., Garfinkle v. Arcata National Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974). Moreover, even

were these materials covered by Rule 26(b)(3), the crime/fraud exception, *see supra*, would apply to render them discoverable in this action. *See In re International Systems & Controls Corp., etc.*, 693 F.2d 1235, 1242 (5th Cir. 1982). Finally, even were such documents deemed to be work product not within the crime/fraud exception, their obvious relevance to the instant case would render them discoverable under the balancing approach referenced by Magistrate Penne at the oral hearing on the Motion to Compel. Transcript of September 30, 1985 Hearing at 38-39; *see Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed.2d 451 (1947) ("Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had."); *see generally* 8 Wright & Miller, *Federal Practice and Procedure* Section 2025 (1970).

4. Documents dating from after the plaintiff's investment are not *per se* irrelevant. *See* F.R. Civ. P. 26(b)(1) (sufficient that information sought "appears reasonably calculated to lead to the discovery of admissible evidence"); F.R.E. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Materials postdating the plaintiff's purchase may indicate a course of conduct by the defendants, and may also help to explain what happened prior to the plaintiff's investment. *See, e.g., Garfinkle, supra.*

5. The objection based on the circumstance that some of the documents sought are also available in the public record is without merit. *See* 8 Wright & Miller, *Federal Practice and Procedure* Section 2014 at 110-11 (1970) ("it is not usually ground for objection that the information is equally available to the interrogator or is a matter of public record"). Similarly, the magistrate's rul-

ings as to overbreadth were not clearly erroneous or contrary to law.

6. The objection to Magistrate Penne's denial of Requests Nos. 1, 2, 3, 30, 31, 32 and 33 was not served and filed within 10 days after entry of the magistrate's order, as required by Federal Rule of Civil Procedure 72(a). In any event, the rulings on these matters were not clearly erroneous or contrary to law.

IT IS SO ORDERED.

DATED: March 5, 1986.

/s/ William D. Keller
WILLIAM D. KELLER
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-7357

DC# CV-83-7340-WDK
Central California

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

DANIEL M. GOTTLIEB,
Real Party in Interest.

[Filed Oct. 24, 1986]

Before: HUG, POOLE and NORRIS, Circuit Judges

This petition for writ of mandamus is denied. Petitioner has not demonstrated that the district court clearly erred in compelling the production of documents.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-7357

DC# CV-83-7340-WDK
Central California

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

DANIEL M. GOTTLIEB,
Real Party in Interest.

[Filed Dec. 17, 1986]

Before: HUG, POOLE and NORRIS, Circuit Judges

The petition for rehearing is denied.

No. 86-1636

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

VS.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Nominal Respondent,
AND
DANIEL M. GOTTLIEB,
Real Party in Interest.

BRIEF OF ALLAN CARR AND DANIEL M. GOTTLIEB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Real Party in Interest.

BRIEF OF ALLAN CARR AND DANIEL M. GOTTLIEB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiff Allan Carr ("Carr") and Third Party Defendant and Real Party in Interest Daniel M. Gottlieb ("Gottlieb") respectfully submit this Brief in opposition to the Petition of Cadwalader, Wickersham & Taft ("Cadwalader") that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a petition for a writ of mandamus, entered October 24, 1986.

For the reasons more fully stated below, the order entered March 7, 1986 by the United States District

Court for the Central District of California (the "Respondent Court") is not clearly erroneous as a matter of law. Of equal importance, Cadwalader fails to show any exceptional circumstances sufficient to invoke this Court's jurisdiction over an interlocutory discovery order or that its right to issuance of a writ of mandamus is "clear and indisputable." The Petition should therefore be denied.

OPINIONS BELOW

Supplementing the orders set forth in the Appendix to the Petition, the order of the court of appeals under Fed. R. App. P. 21(b) requiring Gottlieb to answer Cadwalader's petition for a writ of mandamus appears in Appendix A, *infra*, p. 1a. The district court's "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, Denying Defendant Cadwalader, Wickersham & Taft's Motions for Change of Venue and for Sanctions and Discovery," entered September 26, 1984, is set forth in Appendix C, *infra*, pp. 4a-13a.

THE STATUTES, RULES AND REGULATIONS THE CASE INVOLVES

The following statutes, rules and regulations are of particular relevance to this proceeding and are set forth in Appendix E hereto: Federal Rule of Civil Procedure 26(b)(3); Federal Rule of Evidence 501; California Corporations Code § 25102(f) (West 1977), *amended by* 1981 Cal. Stat., ch. 1120, § 1 (effective Nov. 1, 1981); California Corporations Code §§ 25110, 25504 & 25504.1 (West 1977 & Supp. 1987); California Administrative Code, title 10, § 260.102.2 (1980) (amended effective Nov. 1, 1981).

STATEMENT OF THE CASE

A. NATURE OF THE PRESENT PROCEEDING

Over two years ago, on May 17, 1985, Daniel M. Gottlieb, Carr's attorney-in-fact and business manager, personally served on Cadwalader a request for production of documents. Among other things, that request demanded the production of documents Cadwalader had used in preparing two purported private placement memoranda on behalf of Defendant Sentinel Government Securities (the "Partnership"); all correspondence which Cadwalader had received from or transmitted to the Sentinel Defendants; [1] and the records of any due diligence investigations it had conducted in connection with the two securities offerings made by the Partnership.

On June 27, 1985, Cadwalader served a response in which it objected, both generally and specifically, to each of Gottlieb's document requests on a number of different grounds. Notwithstanding these objections, on July 15, 1985 — a total of fifty-eight days after Gottlieb's request had been personally served on its counsel — Cadwalader produced documents in response to nine of Gottlieb's requests. With respect to the remaining document requests, however, Cadwalader categorically refused to produce or even identify any documents responsive thereto. As a result, on September 11, 1985, Gottlieb filed a motion to compel production of documents.

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[1] At all material times herein, the general partners of the Partnership were Defendants Sentinel Financial Instruments, a New York general partnership ("SFI"); SGS, Inc., a Connecticut corporation; and Michael M. Senft ("Senft"). The Partnership and its general partners are collectively referred to herein as "Sentinel" and the "Sentinel Defendants."

The motion was heard on September 30, 1985 before the Honorable James J. Penne, United States Magistrate. Contrary to the Petitioner's repeated inferences that the Respondent Court wholly abrogated the attorney-client privilege and ordered disclosure of all documents requested, the magistrate in fact denied a number of Gottlieb's requests. The requests that were denied included each of those set forth in the application Cadwalader filed with this Court on March 2, 1987[2] and which collectively called upon Cadwalader to produce "any and all" documents it received from or transmitted to Sentinel. Rather, as exemplified in Cadwalader's own transcription of the September 30, 1985 hearing, Magistrate Penne refused to compel production on those three requests on the ground that "[t]hey're too broad [and] . . . not limited to this particular transaction that is involved at issue in this case." (App. B, *infra*, p. 2a).

On the other hand, during the hearing the magistrate chastised Cadwalader for its complete failure to identify the documents which it claimed were privileged.

> You can't expect to stand behind a blanket authority, a blanket claim, and not give opposing counsel and the court an opportunity to evaluate your claim. You don't have to reveal anything that's privileged but you at least ought to tell, state enough of the general nature of the document to enable someone to decide whether or not there's a basis for challenge.

Id. at 2a-3a.

Adopting the form of order submitted by Cadwalader, on November 12, 1985, the magistrate entered an order

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[2]Application for Extension of Time to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, dated March 2, 1987, ¶ 5.

granting in part and denying in part Gottlieb's motion to compel production of documents. (Petition, App. A). Cadwalader timely objected to that order on a number of different grounds. However, the principal thrust of its argument before the Honorable William D. Keller, United States District Judge, was that "Magistrate Penne's sole rationale for overruling [Cadwalader's] objections was that the documents requested were 'at issue in a lawsuit' and that 'the need for the information' outweighs 'the policy behind the attorney-client privilege.' " *Cf.* Petition at 5 ("the magistrate based his ruling solely on the grounds of relevance and need").

In the "Order re Objections to Magistrate's Order," entered March 7, 1986 (the "Order") (Petition, App. C), the Respondent Court affirmed Magistrate Penne's order in its entirety and overruled each of Cadwalader's objections. Although noting the validity under Federal Rule of Civil Procedure 26(b)(3) of "the balancing approach referenced by Magistrate Penne at the oral hearing on the Motion to Compel," clearly, in drafting the Order Judge Keller also relied heavily upon the factual showing and legal reasoning set forth in Gottlieb's original moving papers and the declarations and exhibits filed in support thereof. Thus, for example, the Respondent Court's findings that "defendant Michael M. Senft was convicted of a single conspiracy that included both Sentinel Government Securities ('SGS') and Sentinel Financial Instruments ('SFI') . . . [and] the activities of SFI and SGI [sic] were apparently intertwined" (Petition, App. C at 6a) are copied almost verbatim from language used by the Second Circuit Court of Appeals in its decision affirming Senft's criminal convictions of tax fraud. (App. D, *infra*, pp. 14a-21a).

On June 17, 1986, Cadwalader filed a petition requesting the Ninth Circuit to vacate the Order or, in the alternative, to direct the Respondent Court "to conduct an *in camera* review of the documents prior to any disclosure . . . ." [3] Pursuant to Fed. R. App. P. 21(b), on August 4, 1986, the court of appeals entered an order requiring Gottlieb to answer the petition. (App. A, *infra*, p. 1a). Collectively, the parties herein placed before that court literally hundreds of pages of relevant declarations, exhibits and other evidence. After due consideration thereof, on October 24, 1986, a three-member panel of the Ninth Circuit denied the petition finding that Cadwalader "has not demonstrated that the district court had clearly erred in compelling the production of documents." (Petition, App. D at 9a). On December 18, 1986, the Ninth Circuit denied Cadwalader's petition for a rehearing *en banc*.

B. STATEMENT OF FACTS

Defendant Sentinel Government Securities was organized on June 16, 1980. That autumn, the Partnership retained Cadwalader, its general counsel, to prepare a purported "Private Placement Memorandum" (the "Offering Memorandum") in connection with the offer for sale of 150 limited partnership interests.

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[3] As discussed more fully at pp. 24-25, *infra*, Cadwalader's claim that it "specifically offer[ed] the documents for *in camera* inspection" (Petition at 5) is as factually unsupported, as it is unsupportable. To the contrary, except for one fleeting reference buried within its 35-page memorandum in support of its objections to Magistrate Penne's order (*id.* at 5 n.2), before the Respondent Court Cadwalader steadfastly refused to produce or even identify any of the documents it asserts are privileged, and it never offered to disclose any of its work product for *in camera* inspection.

The Offering Memorandum was intended to be and was in fact distributed within the State of California and circulated among broker-dealers, investment advisers and other members of the public. Ultimately, over thirty California residents purchased limited partnership interests in the Partnership — more than any other state in which the securities were offered.

An integral part of the Offering Memorandum was a draft opinion letter prepared over Cadwalader's signature and partially dated October __, 1980 (the "opinion letter"). The opinion letter discussed in detail the probable tax consequences of the Partnership's operations, and Cadwalader knew that it would be relied upon by potential investors in their tax planning.

Relying upon the representations contained in the Offering Memorandum, Gottlieb purchased three "Units" in the Partnership on Carr's behalf on November 12, 1980. However, the Offering Memorandum and opinion letter omitted to state certain material facts — most notably, that Sentinel intended to engage in billions of dollars in false and arranged trading transactions between the Partnership and affiliated entities (including defendant SFI) as part of a fraudulent scheme to create fake tax write-offs.

To be accepted as a limited partner, each of the potential investors in the Partnership was required to execute a Subscription Agreement stating that he understood that "the offering and sale of the Units are intended to be exempt from registration under the Securities Act of 1933 . . . and from registration and/or qualification under any applicable state securities laws . . ." In truth, however, at the time of the offer for sale and sale of the Units to Carr, the Units were not, and still are not, qualified (nor

exempt from qualification) with the California Department of Corporations.

Subsequently, Cadwalader prepared another purported "Private Placement Memorandum," dated October 28, 1981, in connection with a second offering of securities in the Partnership. Less than three weeks later, however, that offering was abruptly withdrawn when the Internal Revenue Service seized books and records of the Partnership and of SFI and commenced an investigation into the trading activities of those two entities. That investigation resulted in an indictment filed two years later charging Senft and four other managers of the Partnership and SFI with perpetrating the then largest criminal tax fraud in United States history.

Following a four-week trial and six days of deliberations, the jury in the criminal action against Senft and the four other Sentinel managers was deadlocked. Consequently, the trial judge accepted a partial verdict convicting Senft of fourteen counts of tax fraud and declared a mistrial as to each of the other counts against him. Senft was sentenced to fifteen consecutive years imprisonment and total fines of $80,000 and is currently incarcerated at the federal correctional facility in Danbury, Connecticut. On March 29, 1985, the Second Circuit upheld Senft's convictions (App. D, *infra*, pp. 14a-21a), and, on November 4, 1985, this Court denied his petition for a writ of certiorari.

Eleven days before Senft was indicted by the Government, Carr commenced his lawsuit in the Respondent Court. In his Second Amended and Supplemental Complaint, Carr sets forth eight separate claims for relief against Cadwalader arising under federal and California securities laws, and for common law fraud, negligent misrepresentation and legal malpractice. In sum, the

complaint charges that Cadwalader intentionally or with a reckless disregard for the truth participated in and/or materially aided and abetted Sentinel's scheme and course of conduct to sell unqualified securities within the State of California and to defraud the limited partners of the Partnership. Carr further alleges that, in violation of its professional responsibility and the duty it owed to Plaintiff and other investors, Cadwalader failed to exercise reasonable care and due diligence in the preparation of the Offering Memorandum and opinion letter.

In answering the complaint, Cadwalader candidly admits that the Offering Memorandum offered for sale within the State of California 150 limited partnership interests in the Partnership and that these securities were not qualified with the California Department of Corporations. However, it also affirmatively alleges that: (1) The Units were not required to be qualified under the California Corporate Securities Law of 1968; and (2) "If, as plaintiff alleges, he was the victim of any fraud, Cadwalader was the victim of the same fraud" and is therefore entitled to indemnification or contribution.

On October 15, 1984, Cadwalader filed a Cross-Claim and Third-Party Complaint against Sentinel and Gottlieb, respectively, for indemnity and contribution. Cadwalader's Third-Party Complaint alleges that Gottlieb failed to conduct a diligent investigation regarding the Partnership and California blue sky law before purchasing the Units on Carr's behalf and, in effect, charges that he had no right to rely upon the opinion letter and Private Placement Memorandum that Cadwalader itself had prepared.

On February 8, 1985, the Respondent Court entered a "Stipulation and Order re Preservation of Confidential Information." In essence, that order provides that any

information designated as "confidential material" by the producing party shall be used solely for the purpose of the action and may be disclosed only to attorneys of record, third-party experts and parties and to the court under seal.

SUMMARY OF ARGUMENT

I. The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. Claims of privilege do not enjoy a special status in considering a petition for an extraordinary writ, and the party seeking mandamus has the burden of showing that its right to issuance of the writ is "clear and indisputable." Mere error, even gross error, is insufficient. If there is any legal theory which could support the Respondent Court's ruling, it must be affirmed.

II. To overcome a claim of privilege using the crime-fraud exception, the proponent must merely make a prima facie showing that the legal advice has been obtained in furtherance of an illegal or fraudulent activity and need not actually prove the disputed fact. In light of the criminal tax fraud convictions of Michael M. Senft and the defendants' admissions that Sentinel Government Securities offered for sale within California 150 limited partnership interests without qualifying these securities, there was substantial evidence to support the Respondent Court's factual conclusions.

III. The fiduciary obligations among partners are stronger than the policy favoring privileged communications. A partner charged with acting inimically to the partnership's interest is thus not entitled to claim the attorney-client privilege against his own partners in an action to determine the proper functioning of his actions.

IV. By definition, the work product doctrine only applies to documents "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3). Every court of appeals that has addressed the application of the crime-fraud exception to work product has concluded that it does apply. The work product doctrine is also abrogated when it is the very activities of counsel of which plaintiff complains or when necessity and good cause is shown.

V. Cadwalader's untimely request for an *in camera* review is not properly before this Court. In any event, a "failure" to review assertedly privileged documents *in camera* does not constitute an abuse of discretion.

ARGUMENT

I.

THE SCOPE OF REVIEW: CADWALADER MUST SHOW THAT ITS RIGHT TO ISSUANCE OF A WRIT IS CLEAR AND INDISPUTABLE

A. A Claim of Privilege Does Not Enjoy Special Status in Considering Whether the Drastic Remedy of Mandamus Should Have Been Granted.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976), *aff'g* 511 F.2d 192 (9th Cir. 1975). Mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). This standard has been "repeatedly reaffirmed in cases such as *Kerr* and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953)." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978) (citations omitted).

Since "[a]s a general proposition, discovery orders are not jurisdictional [,they] thus may not be reached under traditional concepts of mandamus except in the most extraordinary circumstances." *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975). *Accord, In re Banker's Trust Co.*, 775 F.2d 545, 547 (3d Cir. 1985). Indeed, to hold otherwise invites "the obvious possibilities for abuse in the typical case if a court of appeals were to exercise intermittent supervisory power over discovery in the district courts . . . ." *American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 284 (2d Cir. 1967).

"The contention that the claim of privilege enjoys a special status in considering a petition for an extraordinary writ has been expressly rejected by the United States Supreme Court in *Will v. United States*, 389 U.S. 90, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967)." *City of Los Angeles v. Williams*, 438 F.2d 522, 522-23 (9th Cir. 1971). In *Barclaysamerican Corp. v. Kane*, 746 F.2d 653 (10th Cir. 1984), the defendants in a civil suit for alleged federal and state securities laws violations petitioned for a writ of mandamus or prohibition to vacate a district court order directing the disclosure of documents which were assertedly protected by the attorney-client privilege or the work product doctrine. Holding that the showing of the extraordinary circumstances required for the writ had not been made, the Tenth Circuit observed:

> [T]he instant case involves a discovery dispute between private litigants. We cannot say that a question of substantial importance to the administration of justice is at issue.
>
> * * *
>
> [As in *Will v. United States*, 389 U.S. 90 (1967)], there is [also] no evidence that the trial judge has a

> general policy of ordering production of information protected by the attorney-client privilege or work product doctrine. . . .

Id. at 655.

Yet, even if the Court were to accept Cadwalader's conclusionary statements that the decision below "presents a serious threat to the attorney-client privilege and the work product doctrine" (Petition at 13) and later appeal is clearly an inadequate remedy, in addition, "[i]t is essential that the moving party satisfy 'the burden of showing that its right to issuance of the writ is "clear and indisputable." ' " *Calvert Fire Ins. Co.*, 437 U.S. at 662 (citations omitted). This burden Cadwalader does not—for indeed it cannot — meet.

B. The Order Must Be Affirmed If There Is More Than One Permissible View of the Evidence and There Is Any Legal Theory Which Could Support the Ruling.

Will v. United States, 389 U.S. 90 (1967) and *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945) make plain that mere error, even gross error in a particular case, does not suffice to support issuance of a writ of mandamus. *United States v. De Stefano,* 464 F.2d 845, 850 (2d Cir. 1972). Indeed, even "[i]f we assume . . . that the judge is wrong on all points, his wrongness would be the kind of error, grounded on differing perceptions of where lines should be drawn, which would be grist for the appellate but not for the mandamus mill." *United States v. Kane*, 646 F.2d 4, 10 (1st Cir. 1981).[4]

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[4] *See also* Mid-America's Process Serv. v. Ellison, 767 F.2d 684, 686 (10th Cir. 1985) (appellate review of civil judgment could correct any impermissible consequences of trial court's allegedly improper ruling on privileges); *In re United States (Peck)*, 680 F.2d 9, 12 (2d Cir.

Nevertheless, Cadwalader argues that "mandamus, although an exceptional remedy, should be used where there is a clear error in the court below. . . ." (Petition at 15). The "clearly erroneous" standard of review, however, "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Id. at 573-74 (citations omitted).

Second, under the "clearly erroneous" standard, "it is well-established that if any ground exists which would support" the Order, it must be affirmed. *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1248 (9th Cir. 1979). In this regard, Cadwalader asserts that "the magistrate based his ruling solely on the grounds of relevance and need" (Petition at 5), and, subsequently, Judge Keller "address[ed] issues which were not considered by the magistrate" (*id.*) and "ignored" arguments it had raised

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1982) (district court's denial of Government's privilege claim is reviewable on appeal but does not constitute a "usurpation of power" warranting mandamus).

(*id.* at 6). At the outset, counsel for Carr and Gottlieb do not profess to have the same powers of telepathy as claimed by their learned opponents and would not presume to divine all of the factors Magistrate Penne and Judge Keller considered in reaching their respective decisions. Yet, it is not critical that we delve into the psyches of these two learned jurists for "in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' " *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

When, as here, a trial judge is not required to enter supporting findings of facts and conclusions of law and "there could be other unarticulated bases for the . . . order, it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion. . . ." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 37 n.3 (1980).

Likewise, in the instant case, it simply cannot be gainsaid that the Respondent Court's account of the evidence is plausible in light of the record viewed in its entirety and that Gottlieb has advanced at least one legal theory which would support the Order. As a result, even under a "clearly erroneous" standard, Cadwalader's Petition must be denied.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE RESPONDENT COURT'S DETERMINATION THAT A PRIMA FACIE SHOWING HAD BEEN MADE UNDER THE CRIME-FRAUD EXCEPTION

"The crime or fraud exception applies even where the attorney is completely unaware that his advice is sought

in furtherance of an improper purpose." *United States v. Hodge & Zweig,* 548 F.2d 1347, 1354 (9th Cir. 1977). *Accord, In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co.)*, 731 F.2d 1032, 1038 (2d Cir. 1984); *United States v. Horvath*, 731 F.2d 557, 562 (8th Cir. 1984). The rationale behind this rule is that "the client has no legitimate interest in seeking legal advice in planning future criminal activities. The crime-fraud exception therefore comes into play if 'the client consults an attorney for advice that will assist the client in carrying out a contemplated illegal or fraudulent scheme.' " *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (quoting *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977)).

Cadwalader's charge that there is no factual basis in the record for the Respondent Court's conclusion that "the decision of the magistrate is supportable under the crime/ fraud exception to the attorney-client privilege" is simply without merit. First, as Cadwalader itself admits, in the criminal proceedings before the Southern District of New York,[5] Senft was convicted on the first count of the indictment which, among other things, charged that the conspirators "created a new limited partnership, SGS

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[5]Significantly, in the Government's criminal action against Senft, the same claims of privilege Cadwalader asserts here were repeatedly rejected by the courts. Thus, for example, in denying a motion to quash the grand jury subpoena addressed to Senft's criminal attorneys, the district court noted:

> Since the records of SFI are not privileged while in the possession of Senft, they are not privileged in the hands of Wachtell, Lipton, and the movants may not rely on the attorney-client privilege to prevent production of the SFI records.

In re Grand Jury Subpoenas Addressed to Sentinel Fin. Instruments, 553 F. Supp. 71, 76 (S.D.N.Y.), *aff'd mem.*, 714 F.2d 113 (2d

[Sentinel Government Securities], of which SFI was a general partner, to market fraudulent tax benefits. To this end, the conspirators intentionally made false statements and false factual representations to the law firm [Cadwalader] which drafted tax opinion letters and private placement memoranda for SGS in 1980 and 1981 based on these false statements and false representations."

Second, the Respondent Court's finding that "Senft was convicted of a single conspiracy that included both Sentinel Government Securities ('SGS') and Sentinel Financial Instruments ('SFI')" (Petition, App. D at 6a) is directly supported by the opinion of the Second Circuit upholding that conviction.

> The district court properly instructed and left to the jury the question whether the evidence established a single conspiracy. The proof, which showed a substantial intermingling of SFI and SGS operations and employees, was sufficient to support the jury's determination that only a single conspiracy existed. The jury was instructed to disregard evidence concerning SGS in determining Antonucci's guilt, and can be presumed to have followed those instructions absent any showing to the contrary.

(App. D, *infra,* p. 19a) (citations omitted).

Further, in light of the defendants' admissions that the Partnership offered for sale within California 150 limited partnership interests yet failed to qualify these securities with the Department of Corporations, it can hardly be denied that Gottlieb has "produce[d] enough evidence to

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Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983) (footnote omitted). *See also* In re Sentinel Gov't Sec., 530 F. Supp. 793 (S.D.N.Y.), *petition for mandamus denied*, 697 F.2d 297 (2d Cir.), *cert. denied*, 456 U.S. 977 (1982).

subject the attorney and the client to the 'risk of non-persuasion,' if the evidence [of a violation of Cal. Corp. Code § 25110] is left unrebutted." *In re Grand Jury Subpoenas Dated December 18, 1981 & January 4, 1982*, 561 F. Supp. 1247, 1254 (E.D.N.Y. 1982). *See also Western Fed. Corp. v. Erickson*, 739 F.2d 1439, 1442 (9th Cir. 1984) (burden of proving the availability of an exemption under the securities laws lies with the party claiming the exemption); *People v. Graham*, 163 Cal. App. 3d 1159, 1169-74, 210 Cal. Rptr. 318, 325-29 (1985) (construing Cal. Corp. Code § 25102(f) (West 1977) & 10 Cal. Admin. Code § 260.102.2 (1980)).[6]

III.

THE ATTORNEY CLIENT PRIVILEGE IS INAPPLICABLE WHEN SUIT IS BROUGHT AGAINST A FIDUCIARY OR BETWEEN PARTNERS

Where " 'corporations and their officers are charged with acting inimically to the stockholder's interest, the fiduciary obligations owed to those stockholders are stronger than the policy favoring privileged communications, and the attorney-client privilege is not available in such circumstances.' " *In re Transocean Tender Offer Sec. Litig.*, 78 F.R.D. 692, 694-95 (N.D. Ill. 1978) (citations omitted). Likewise,

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[6]In this regard, Carr and Gottlieb respectfully direct the Court's attention to Appendix E in which the applicable California statutes and rule governing limited private offerings in effect at the time the limited partnership interests were offered and sold to Carr are reproduced. It was not until nearly a full year after Gottlieb's purchase of the three Units on Carr's behalf that Cal. Corp. Code § 25102(f) was amended to add a 35-purchaser "safe harbor" comparable to former SEC Rule 146, now Regulation D. 1981 Cal. Stat., ch. 1120, § 1 (eff. Nov. 1, 1981).

> *Garner v. Wolfinbarger* and *Bailey v. Meister Brau, Inc.* stand generally for the proposition that where a corporation seeks advice from legal counsel, and the information relates to the subject of a later suit by a minority shareholder in the corporation, the corporation is not entitled to claim the privilege as against its own shareholder, absent some special cause . . . . More important is the basis of those decisions, resting in each case on the understanding that a corporation is, at least in part, the association of its shareholders, and it owes to them a fiduciary obligation which is stronger than the societal policy favoring privileged communications.[7]

It requires no citation of authority that the fiduciary obligations of one partner to another are, if anything, even greater than those between a corporation and its shareholders. Thus, Cadwalader may not invoke the attorney-client privilege to shield from Carr and his attorney-in-fact, Gottlieb, their legitimate inquiries concerning the management and operations of the Partnership. The Respondent Court's alternative reasoning under the joint-client exception is therefore not clearly erroneous as a matter of law.

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[7]Valente v. Pepsico, Inc., 68 F.R.D. 361, 367-68 (D. Del. 1975) (examining Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied sub nom.* Garner v. First Am. Life Ins. Co., 401 U.S. 974 (1971); Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972)). *See also* Washington Baltimore Newspaper Guild Local 35 v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982); Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D. Ill. 1978); Broad v. Rockwell Int'l Corp., 1976-77 Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex. 1977).

IV.

THE RESPONDENT COURT'S ORDER REQUIRING DISCLOSURE OF "WORK PRODUCT" WAS NOT CLEARLY ERRONEOUS AS A MATTER LAW

A. The Requested Documents Are Not Work Product Since They Were Not "Prepared in Anticipation of Litigation or for Trial."

By definition, the work product doctrine only applies to documents "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3). "While the issuance of opinion letters on the registration of shares might result in liability for the parties involved, this is a routine procedure necessary in the securities field and is not done with litigation in mind." *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974).[8]

"The purpose of the [work product doctrine] . . . is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). As a result, "the burden of showing that the materials were prepared in anticipation of litigation is on the party asserting the privilege." *Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 41 (S.D.N.Y. 1984). That burden Cadwalader failed to meet in the proceedings before Magistrate Penne, and "[i]t certainly is not clearly erroneous or contrary to law to conclude

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[8] *Cf.* Fed. R. Civ. P. 26(b)(3) advisory committee's note: "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision."

that the documents requested in the present case do not fit this description." Order ¶ 3 (Petition, App. C at 6a).

B. The Work Product Doctrine Does Not Apply When an Attorney Is Consulted as Part of a Continuing Plan to Commit a Crime or Fraud or When the Activities of Counsel Are at Issue in the Lawsuit.

"Every court of appeals that has addressed the crime-fraud exception's application to work product has concluded that it does apply." *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982). The work product doctrine is waived for client fraud even when asserted by the attorney. *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 63 (7th Cir. 1980). Indeed, particularly where, as here, "the work-product itself may be part of a criminal scheme . . . all reason for protecting it from judicial examination evaporates." *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982).

Second, to the extent that any of the documents requested do constitute work product, the doctrine is abrogated when it is the very activities of counsel of which plaintiff complains. *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968). *Accord, SEC v. National Student Mktg. Corp.*, 18 Fed. R. Serv. 2d 1302, 1305-06 (D.D.C. 1974).

Third, under *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." In other words, "[a]s to an attorney's work product, its immunity retreats as necessity and good cause is shown for its production in a balance of competing interests." *Kirkland*, 46 F.R.D. at 30. In light of then District Judge Hall's September 25,

1984 order in this action that Cadwalader may be liable under the federal securities law only if it (1) had directly participated in the misrepresentation or (2) had actual knowledge of and substantially aided in the wrong (App. C, *infra*, pp. 8a-10a), the scope and manner of Cadwalader's involvement in the transaction is critical and, in large measure, can only be proved by documents which are solely in Cadwalader's possession. Thus, Gottlieb and Carr have "a particularized and compelling need for the production of the relevant work product of these attorneys" (*A.M. Int'l, Inc. v. Eastman Kodak Co.*, 35 Fed. R. Serv. 2d 311, 313 (N.D. Ill. 1982)), and the Respondent Court did not abuse its discretion in ordering their production. *See, e.g., Diamond v. Stratton*, 95 F.R.D. 503 (S.D.N.Y. 1982); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 931 (N.D. Cal. 1976).[9]

VI.

THE "FAILURE" OF THE RESPONDENT COURT TO CONDUCT AN IN CAMERA INSPECTION IS NOT PROPERLY BEFORE THIS COURT AND, IN ANY EVENT, DOES NOT CONSTITUTE AN ABUSE OF DISCRETION

Perhaps Cadwalader's most egregious abuse of the discovery rules in the proceedings below was its multiple

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[9]To preserve the issue should the Court grant the Petition (*see* Wiener v. United States, 357 U.S. 349, 351 n.* (1958)), Carr and Gottlieb also contend that Cadwalader waived its right to resist production by its selective disclosure of certain work product documents and by placing in issue its clients' fraud and purported compliance with the securities laws. Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981); Central Soya Co. v. Geo. A. Hormel & Co., 581 F. Supp. 51, 53 (W.D. Okla. 1982); Garfinkle, 64 F.R.D. at 689-90.

assertions of the attorney-client privilege and the work product doctrine without ever attempting to identify the documents for which the privileges were claimed. Such blanket claims of privilege are clearly improper. *FTC v. Shaffner,* 626 F.2d 32, 37 (7th Cir. 1980); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 305 (S.D.N.Y. 1982); *SEC v. Dresser Indus., Inc.*, 453 F. Supp. 573, 576 (D.D.C. 1978), *aff'd*, 628 F.2d 1368 (D.C. Cir.), *cert. denied,* 449 U.S. 993 (1980).

As Magistrate Penne incisively observed at the September 30, 1985 hearing,

> [I]f the opposing party wishes to claim the privilege they must set out a schedule of the documents, identify the documents, who the author of the document is, who the recipient is, and on what ground the privilege is claimed, whether it's work product or attorney-client. . . . You can't expect to stand behind a blanket authority, a blanket claim, and not give opposing counsel and the court an opportunity to evaluate your claim. You don't have to reveal anything that's privileged but you at least ought to tell, state enough of the general nature of the document to enable someone to decide whether or not there's a basis for challenge.

(App. B, *infra*, p. 2a-3a). *Cf. Kerr,* 426 U.S. at 400 (" 'claiming a privilege should involve specifying which documents . . . are privileged and for what reasons' ").

"Without identification of the documents, the party against whom the privilege is claimed is completely unable to challenge the validity of that claim. The outcome is indefensible." *A.M. Int'l, Inc. v. Eastman Kodak Co.*, 100 F.R.D. 255, 256 (N.D. Ill. 1981). Indeed, "[a]n improperly asserted claim of privilege is no privilege at all."

International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 94 (D. Del. 1974).[10]

Notwithstanding Cadwalader's patent failure *to this day* to identify the documents it claims are privileged, the Petitioner apparently requests this Court to reverse summarily this matter with directions that the Respondent Court conduct an *in camera* review of these documents, whatever they may be. Had Cadwalader made such an offer on June 17, 1985 when its response to Gottlieb's request for production of documents was initially due, the requested *in camera* inspection would arguably merit consideration by this Court and may indeed have obviated the need for what has now become a two-year struggle by Carr and Gottlieb to compel their production.

Yet, the only reference in the entire record that Cadwalader "specifically offer[ed] the documents for *in-camera* inspection" before the Respondent Court is one lonely sentence buried in the middle of Cadwalader's 35-page memorandum filed in support of its objections to the magistrate's order. (Petition at 5 & n.2). In sum, Cadwalader's purported offer of an *in camera* inspection was not made until after Magistrate Penne had already ruled on Gottlieb's motion to compel, the "offer" was apparently limited only to attorney-client communications and did not include work product, and, clearly, none of the parties briefed this issue during the proceedings in the Respon-

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[10] *Compare* United States Dep't of Energy v. Crocker, 629 F.2d 1341 (Temp. Em. Ct. App. 1980) (district court erred in declining DOE's proffer of *in camera* review when DOE had prepared "a detailed index of the withheld documents and the privilege claimed as to each") *with* Coastal Corp. v. Duncan, 86 F.R.D. 514, 522-24 (D. Del. 1980), *cited with approval in* Crocker, 629 F.2d at 1345 n.* (district judge had no necessity to review documents when DOE had failed to raise privilege claims properly).

dent Court. As a result, Cadwalader's request for an *in camera* review is not properly before this Court. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Kerr*, 426 U.S. at 405 n.9; *Country Fairways, Inc. v. Mottaz*, 539 F.2d 637, 642 (7th Cir. 1976) ("an issue not presented in the court below cannot be raised for the first time on appeal and form a basis for reversal").

Further, while this Court — as well as the Ninth Circuit (*In re Grand Jury Investigation of Hugle*, 754 F.2d 863, 865 (9th Cir. 1985)) — has commended the judicious use of *in camera* proceedings to resolve disputed issues of privilege, at least in civil matters a party does not have a right as a matter of course to demand an *in camera* review; rather, the matter lies within the sound discretion of the trial court. *See Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401 (D.C. Cir. 1984); *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 445 (D. Del. 1982). *See also Hayden v. Maldonado*, 110 F.R.D. 157, 160 (N.D.N.Y. 1986) (magistrate did not have to review files *in camera* when objecting party "failed to comply with *Kerr*" by interposing privilege objections in blanket fashion). The "failure" of the Respondent Court to conduct an *in camera* inspection would not, in any event, constitute an abuse of discretion "amounting to a judicial usurpation of power" as to justify mandamus review. *Allied Chem. Corp.*, 449 U.S. at 35; *Will v. United States*, 389 U.S. at 95; *In re Bankers Trust Co.*, 775 F.2d at 547.

CONCLUSION

For the foregoing reasons, the Petitioner has not shown that its right to issuance of a writ is clear and indisputable. The Petition should therefore be denied. Indeed, Carr and Gottlieb further submit that Cadwalader's petition

for writ of certiorari is frivolous or interposed solely for purposes of delay and that appropriate damages under Supreme Court Rule 49.2 or 28 U.S.C. § 1927 should be awarded.

Respectfully submitted,

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May 18, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-7357

DC # CV-83-7340-WDK
Central California

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

DANIEL M. GOTTLIEB,
Real Party in Interest.

ORDER

[Filed Aug. 4, 1986]

Before: FARRIS, PREGERSON and WIGGINS, Circuit Judges

This petition for writ of mandamus requires further consideration under Fed. R. App. P. 21(b). Within 14 days of the entry of this order, petitioner shall submit an additional three copies of its petition and exhibits. Answers to the petition shall be filed within 28 days of the entry of this order. Petitioner may file a reply memorandum within 42 days of the entry of this order.

Upon completion of briefing, this matter will be submitted to the next regular motions panel for decision.

APPENDIX B

EXTRACT FROM DECLARATION OF PAMELA M. WOODS FILED IN THE UNITED STATES DISTRICT COURT, BEING A TRANSCRIPTION OF THE HEARING BEFORE MAGISTRATE PENNE ON SEPTEMBER 30, 1985

* * * *

Magistrate Penne: ... Now, then. Category No. 1. Request No. 1 is denied. And Request No. 2 is denied. Request No. 3 is denied. Now, Request No. 23. Did the defendant have any particular argument directed to this ....

Mr. Merring: [Counsel for Carr and Gottlieb]: Your honor, may I ask the reason for the ....

Magistrate Penne: They're too broad. They're not limited to this particular transaction that is involved at issue in this case.

Mr. Merring: Is it just on the grounds of overbreadth?

Magistrate Penne: Well. If you're, if you're bringing up the question of attorney-client privilege and work product ....

Mr. Merring: Yes, your honor.

Magistrate Penne: Well I think your point is well taken with respect to those privileges that if the opposing party wishes to claim the privilege they must set out a schedule of the documents, identify the documents, who the author of the document is, who the recipient is, and on what ground the privilege is claimed, whether it's work product or attorney-client. Now there's ample authority been cited by plaintiff in this particular case and there's

lot of other authority too. You can't expect to stand behind a blanket authority, a blanket claim, and not give opposing counsel and the court an opportunity to evaluate your claim. You don't have to reveal anything that's privileged but you at least ought to tell, state enough of the general nature of the document to enable someone to decide whether or not there's a basis for challenge.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-7340-CHH

ALLAN CARR,
Plaintiff,

v.

SENTINEL GOVERNMENT SECURITIES, *et al.*,
Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS, DENYING DEFENDANT CADWALADER, WICKERSHAM & TAFT'S MOTIONS FOR CHANGE OF VENUE AND FOR SANCTIONS AND DISCOVERY

[Entered Sept. 26, 1984]

Defendants' motions to dismiss, defendant Cadwalader, Wickersham & Taft's ("Cadwalader") motion for change of venue to the Southern District of New York, and Cadwalader's motion for sanctions and discovery pursuant to Fed. R. Civ. P. 11 are now before the Court. The Court has considered the evidence presented, the points and authorities submitted by the parties, and the oral argument of counsel.

IT IS HEREBY ORDERED that defendants' motions to dismiss are granted in part and denied in part, Cadwalader's motion for change of venue is denied, and Cadwala-

der's motion for sanctions and discovery is denied. This Order is based on the following:

1. This Court retains jurisdiction over all claims alleged. Plaintiff has sufficiently alleged subject matter jurisdiction under the Securities Act of 1933 (the "1933 Act"), and the Securities Exchange Act of 1934 (the "1934 Act"). Under the doctrine of pendent jurisdiction and the analysis of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), this Court also has jurisdiction over the plaintiff's state law claims. These state law claims arise from a common nucleus of operative facts. Whatever additional facts may be required to establish the state law claims for malpractice and breach of fiduciary duty are insignificant compared to the common facts. Trial of the state law claims in a separate state proceeding would be unfair to the parties and a waste of judicial resources.

2. For purposes of the defendants' motions to dismiss, plaintiff's second claim for relief, misrepresentation under § 11 and § 12(2) of the 1933 Act, is not barred by the applicable statute of limitations. Plaintiff's first complaint is admissible at trial as a prior inconsistent statement, but superseded pleadings are not conclusive judicial admissions at the pleadings stage. *Raulie v. United States*, 400 F.2d 487, 526 (10th Cir. 1968). Claims under § 11 and § 12(2) are governed by § 13 of the 1933 Act and the federal doctrine of equitable tolling. *SEC v. Seabord Corp.*, 677 F.2d 1289, 1293-94 (9th Cir. 1982). Section 13 requires that an action brought under § 11 or § 12(2) be brought within "one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence," but in no event "more than three years after the sale." 18 U.S.C. § 77m. Since plaintiff's first complaint is not an admission for purposes of pleading, whether

plaintiff discovered the alleged misrepresentations or omissions or should have discovered them by reasonable diligence remains a question for the trier of fact. This Court also notes that it sees no basis for applying the tolling provisions of Cal. Code of Civ. P. § 351 to prevent plaintiff's second claim from being barred by § 13 if it is later shown that plaintiff discovered the alleged misrepresentations more than one year before the filing of this cause of action.

3. Plaintiff's first, third and fifth claims are also timely. Plaintiff's first claim for relief, failure to register under Cal. Corp. Code § 25110, is governed by the statute of limitations of Cal. Corp. Code § 25507 which requires actions to be brought within two years of the violation of § 25110 or one year of discovery, whichever expires first. Plaintiff's third and fifth claims for relief, misrepresentation under Cal. Corp. Code §§ 25400-02, are governed by the statute of limitations in Cal. Corp. Code § 25506 which requires actions to be brought within four years of the alleged wrongful misrepresentation or one year of discovery, whichever occurs first. Even though plaintiff has not met the two years from violation requirement of § 25507, and even though defendants may later establish that plaintiff has not met the one year from discovery requirement of § 25506, plaintiff's first, third and fifth claims are still timely because of the operation of Cal. Code Civ. P. § 351. Under Cal. Code Civ. P. § 351 ("§ 351"), the statutes of limitations in question were tolled for the entire time the defendants were not in the State of California. This is true even though defendants were subject to service of process and personal jurisdiction, *Dew v. Appleberry*, 23 Cal. 3d 630, 153 Cal. Rptr. 219 (1979), and even though defendants are not California residents, *Cvevich v. Giardino*, 37 Cal. App. 2d 394, 99 P.2d 573 (1940). Furthermore, the operation of Cal. Corp.

Code § 25550 and the decision of *Loope v. Greyhound Lines, Inc.*, 114 Cal. App. 2d 611, 250 P.2d 651 (1952), do not affect the application of § 351 in this case. Section 25550 appoints the Commissioner of Corporations as an agent for service of process only when there is conduct prohibited by the Corporate Securities Law of 1968 and personal jurisdiction over the alleged wrongdoer "cannot otherwise be obtained." Since personal jurisdiction over the defendants was available no agent was appointed. The *Loope* decision recognized that foreign corporations "doing business" in the state which were subject to substitute service of process through the Secretary of State or another designated agent within California were not absent from the state for purposes of § 351. 250 P.2d at 652. Since defendants in this case were not doing business in California and Cal. Corp. Code § 25550 did not operate to appoint an agent within the state, the reasoning of *Loope* is inapplicable to the present case.

4. Plaintiff's eighth claim, violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et. seq.*, is also timely. This claim is governed by the three-year statute of limitations of Cal. Code Civ. P. § 338. *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984). Since this action was filed within three years of the sale to plaintiff it is timely under Cal. Code Civ. P. § 338.

5. Plaintiff's complaint complies with the mandate of Fed. R. Civ. P. 9(b) that fraud be alleged with particularity. Defendants are appraised of which representations Carr claims are false or misleading, and the time and manner in which such representations were allegedly made.

6. Plaintiff's complaint adequately states a cause of action for malpractice. Under California law an attorney

owes a duty to third parties who are intended recipients of information provided to a client. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

7. Plaintiff's second claim for relief, misrepresentation under § 11 and § 12(2) of the 1933 Act, fails to state a cause of action only to the extent that it alleges aiding and abetting liability against defendant Cadwalader. This Court agrees with the reasoning and conclusion of Judge Pfaelzer in *Hokama v. E. F. Hutton & Co., Inc.*, 566 F. Supp. 636 (C.D. Cal. 1983), that aiding and abetting liability is not available under § 12(2) because it is inconsistent with the objective of § 12(2) to regulate sellers. This does not preclude plaintiff from recovering from Cadwalader under § 12(2) by establishing that Cadwalader was a "participant" in the sale, and therefore liable to plaintiff as a seller. *SEC v. Seaboard Corp.* (Jones), 677 F.2d 1289, 1294-95 (1982). In order to establish that defendant Cadwalader was a participant, plaintiff will have to show that his injury resulted directly and proximately from the actions of Cadwalader. *Id.* at 1294; *see, e.g., Junker v. Crory*, 650 F.2d 1349, 1360-61 (5th Cir. 1981) (corporate attorney involved in negotiations found a "seller" within § 12(2)).

8. Plaintiff's fourth claim for relief, misrepresentation under § 17 of the 1933 Act, § 10 of the 1934 Act, Rule 10b-5, and § 206 of the Investment Advisers Act, fails to state a cause of action against defendant Cadwalader only to the extent that it seeks recovery for aiding and abetting under these sections for reckless conduct by Cadwalader. First, under these sections as under § 12(2) above, Cadwalader may be liable to plaintiff as a participant, if its participation in the misrepresentation was direct, and if it knew or was reckless in not knowing that there was a

material misrepresentation. *SEC v. Seaboard Corp.* (Hugh Johnson), 677 F.2d 1301, 1312 (9th Cir. 1982). Second, liability for aiding and abetting is available under Rule 10b-5 and § 17 upon a showing that Cadwalader had knowledge of the wrong, and substantially assisted in the wrong. *Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S. Ct. 89. However, plaintiff cannot recover from Cadwalader as an aider and abettor merely by showing that Cadwalader was reckless in not knowing of the wrong. Plaintiff refers to the *Harmsen* and *Seaboard Corp.* (Hugh Johnson) decisions to argue that, because Cadwalader owed a duty to the intended beneficiaries of the information it provided, proof of recklessness by Cadwalader can support aiding and abetting recovery. In *Harmsen* the Ninth Circuit held that the elements of aiding and abetting liability under 10b-5 are "(1) the existence of an independent primary wrong; (2) *actual knowledge* by the alleged aider and abettor of the wrong and his or her role in furthering it; and (3) substantial assistance in the wrong." *Id.* (emphasis added). The *Harmsen* court gave no indication that a recklessness standard would suffice, although it did note that some courts have allowed aiding and abetting recovery on a showing of recklessness where a direct fiduciary duty was owed to the injured party by the alleged aider and abettor. *Id.* at 944 n.10. The *Seaboard Corp.* (Hugh Johnson) decision does not support plaintiff's position either. Any indication by the court that recklessness would support a cause of action for aiding and abetting must be disregarded in light of the specific statement that the court was not "confronting" the aiding and abetting issue. 677 F.2d at 1311 n.12. Finally, even if recklessness is used as a basis for aiding and abetting recovery, and this Court thinks that it should not be, the present case is not the type of direct fiduciary duty which calls for the

recklessness standard. Cadwalader's only duty to plaintiff was as the recipient of legal information, not as a client. Those circuits which have imposed aiding and abetting liability for reckless behavior have limited the theory's availability to cases where the alleged aider and abettor owed a "direct fiduciary duty" to the injured party. *See, e.g., Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 45 (2d Cir. 1978), *cert. denied*, 439 U.S. 1039. Application of a recklessness standard in this case would make attorneys who issue tax opinions and offering memorandums guarantors of the facts which their clients provide them and impose a duty to investigate on such attorneys which would significantly increase the cost of legal advice. It is enough, as provided in *Harmsen*, that such attorneys are liable if they have actual knowledge of the wrong.

9. Plaintiff's allegations of recklessness in his sixth claim, fraud and deceit under state law, sufficiently state a cause of action. In California the statutory definitions of fraud, Cal. Civ. Code §§ 1571-73, and deceit, Cal. Civ. Code §§ 1709-10, include recklessness and even negligence among the degrees of scienter which can support these actions. *See* Cal. Civ. Code §§ 1572(2)(5), 1710(2). California courts have recognized that recklessness is sufficient to state a cause of action under a theory of either fraud or deceit. *Gonsalves v. Hodgson*, 38 Cal. 2d 91, 237 P.2d 656, 662 (1951); *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365, 122 Cal. Rptr. 732, 738 (1975).

10. Plaintiff's request for punitive damages in his seventh claim, negligent misrepresentation under state law, is insufficient. Plaintiff's claim for punitive damages in his sixth claim, fraud and deceit under state law, is sufficient only to the extent that it requests punitive damages for intentional fraud or deceit. As noted above,

see ¶ 9, reckless and negligent misrepresentations can serve as the basis of a fraud or deceit action in California. To recover punitive damages, however, plaintiff must also meet the requirements of Cal. Civ. Code § 3294 ("§ 3294"). Section 3294 was amended in 1980 to specify the type of fraud or deceit which can serve as the basis for punitive damages. Stats. 1980, c. 1242, p. 4217, § 1. Section 3294(3) now defines fraud for the purposes of § 3294 as an "intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Thus, only that portion of plaintiff's seventh claim which alleges intentional fraud or deceit can serve as a basis for recovery of punitive damages under § 3294.

11. Plaintiff's claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, is insufficient to state a cause of action. Plaintiff has failed to identify an organization satisfying the enterprise requirement of RICO. 18 U.S.C. § 1961(4). Plaintiff has named one individual and several corporate or partnership entities as RICO defendants. Plaintiff, however, has failed to allege whether there was an ongoing enterprise which all of these defendants associated with, or whether these defendants invested in one or more legitimate enterprises with racketeering proceeds. Absent clearer allegations of the structure of the enterprise or enterprises, the RICO defendants are not given adequate information from which to plan a defense. *See Seville Industrial Machinery Corp. v. Southmost Industrial Machinery Corp.*, 567 F. Supp. 1146 (D. N.J. 1983). Plaintiff is also advised that this Court will allow plaintiff leave to amend to specify the exact amount of expenses incurred in complying with the IRS audit. *See* Complaint ¶ 74.

However, in repleading the RICO claim plaintiff should specify whether it is just these expenses or whether it is these expenses plus the $1.8 million claim which plaintiff is seeking to have trebled under the RICO claim. Finally, both parties are advised that this Court is not disposed to follow the reasoning of the recent Second Circuit decisions of *Bankers Trust Co. v. Rhoades*, ____ F.2d ____ (2d Cir. 1984) or *Sedima v. Imrex Co., Inc.*, ____ F.2d (2d Cir. 1984).

12. Defendants' motions to dismiss plaintiff's first amended complaint are granted as to: (1) that portion of plaintiff's second claim for relief which seeks recovery for aiding and abetting under § 12(2) of the 1933 Act; (2) that portion of plaintiff's fourth claim for relief which seeks recovery for aiding and abetting on a theory of recklessness; (3) that portion of plaintiff's sixth claim which seeks recovery of punitive damages for reckless or negligent conduct; (4) that portion of plaintiff's seventh claim which seeks recovery of punitive damages; and (5) all of plaintiff's eighth claim. In all other respects such motions are denied. By this Order defendants are now required to go forward with this proceeding by filing answers to the first amended complaint on or before October 15, 1984. The granting of defendants' motion as to the eighth claim, RICO, is without prejudice to plaintiff's right to amend. All other portions of plaintiff's first amended complaint which are dismissed are dismissed with prejudice. Plaintiff must file any amendment of the RICO claim on or before October 15, 1984. Defendants may oppose any amended claim under RICO on or before November 5, 1984.

13. Cadwalader's motion for change of venue to the Southern District of New York is denied. Change of venue pursuant to 28 U.S.C. § 1404(a) is discretionary with this

Court. Plaintiff has shown sufficient connections with the Central District of California. The only evidence of inconvenience to defendant Michael Senft before this Court comes from secondhand statements that he is incarcerated in New York. There is no indication that Mr. Senft could not be held in federal prison in California during the course of the trial, or that Mr. Senft could attend a trial in New York. Having considered the convenience of the parties and the convenience of all witnesses, this Court declines to transfer venue.

14. Cadwalader's motion for sanctions pursuant to Fed. R. Civ. P. 11 is denied. Plaintiff's first complaint and plaintiff's first amended complaint are in conflict. The change may indicate that plaintiff's counsel could have thought through their claims more fully, but it is no different than an amendment to add a new cause of action. There is no evidence that the inquiry of Carr's counsel before the first complaint was less than reasonable, or that the allegations in the first complaint or the first amended complaint were made in bad faith.

Dated: September 25, 1984.

/s/ CYNTHIA HOLCOMB HALL

CYNTHIA HOLCOMB HALL
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of March, One Thousand Nine Hundred and Eighty-five.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
Circuit Judges.

84-1254, 84-1264, 84-1281, 84-1286

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL SENFT, WALTER ORCHARD,
JOSEPH ANTONUCCI, and DAVID SENFT,
Defendants-Appellants.

ORDER

[Filed Mar. 29, 1985]

Michael Senft, Walter Orchard, Joseph Antonucci and David Senft appeal from judgments of conviction which followed a jury trial in the United States District Court for the Southern District of New York before Judge Owen. All four appellants were found guilty of conspiracy to defraud the United States through fraudulent tax shelter schemes and of aiding and assisting the filing of

false tax returns. Additionally, Michael Senft was convicted of personal income tax evasion.

The fraudulent schemes involved phantom trading in government securities, rigged so as to give investors apparent tax losses, together with the phony documentation and misleading representations that were an essential part of the fraudulent transactions. The trading purportedly was done by two limited partnerships, Sentinel Financial Instruments (SFI) and Sentinel Government Securities (SGS). The aiding and assisting counts resulted from the filing of false returns by investors and by Michael Senft himself.

The Government's proof, which we need not recount, convincingly established appellants' guilt on all the counts on which they were convicted. There is no merit in appellants' contention that the conduct which furnished the basis for the conspiracy conviction was not criminal in nature. The sham transactions, which had no economic effect and whose only purpose was tax avoidance, were legally insufficient to justify the tax benefits that were promised and claimed. *See Knetsch v. United States*, 364 U.S. 361 (1960); *United States v. Ingredient Technology*, 698 F.2d 88, 93-97 (2d Cir.), *cert. denied*, 103 S. Ct. 3011 (1983); *Lynch v. C.I.R.*, 273 F.2d 867, 871-72 (2d Cir. 1959); *United States v. Winograd*, 656 F.2d 279, 283 (7th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *United States v. Clardy*, 612 F.2d 1139, 1151-53 (9th Cir. 1980).

Appellants' numerous claims of procedural error are equally without merit. The district court did not err in permitting the Government to introduce evidence derived from the police search of the SFI and SGS office. Assuming for the sake of argument that at least one of the appellants had a sufficient privacy interest in the premises to be able to challenge the search, the challenge must

fail. A magistrate's finding of probable cause is entitled to substantial deference. *United States v. Travisano*, 724 F.2d 341, 345 (2d Cir. 1983). Based on the affidavit of an I.R.S. agent, which set forth detailed information secured from a former executive of both SFI and SGS concerning the method of operation of the two firms, the magistrate properly could find that fraud so permeated the operations as to justify the search and seizure of the business records described. *See National City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980). Having failed to make a substantial showing that statements necessary to the finding of probable cause were recklessly or intentionally false, appellants were not entitled to a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). The warrants themselves did not lack sufficient particularity. *United States v. Mankani*, 738 F.2d 538, 546 (2d Cir. 1984); *National City Trading Corp. v. United States*, *supra*, 635 F.2d at 1026.

The district court correctly instructed the jury that the losses claimed would be fraudulent if the jury found that the challenged transactions "in their totality . . . were not intended to have and in fact had no economic substance and were entered into solely for the purpose of tax avoidance." *See United States v. Ingredient Technology*, *supra*, 698 F.2d at 93-97 & n.9. Appellants contend that, because a few trades actually were conducted, the jury was precluded from finding a lack of beneficial interest. However, "it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962).

A detailed discussion of the challenged evidentiary rulings of the district court is unnecessary because of the

lack of substance in appellants' numerous claims of error. "Absent abuse of discretion, evidentiary rulings will rarely be disturbed on appeal." *United States v. Asbury*, 586 F.2d 973, 978 (2d Cir. 1978). We see no abuse of discretion or prejudicial error in any of the rulings complained of. The district court properly admitted the letters and lists of SFI and SGS salesmen as sufficiently authenticated agents' admissions, Fed. R. Evid. § 901(a), and other challenged documents as records kept in the ordinary course of business, Fed. R. Evid. § 803(6).

On the other hand, the district court properly barred certain records of appellants' auditors, which were based on false information furnished by appellants and also contained a large measure of inadmissible hearsay. Insofar as the records may have tended to show the auditors' state of mind, their offer was directed towards an irrelevant issue. The legality of appellants' conduct was for the jury to determine on the basis of facts proven on the trial. There is no proof that appellants relied upon the auditors' beliefs and, in the face of the overwhelming proof of knowing and intentional fraud, such reliance could not be inferred. *See United States v. King*, 560 F.2d 122, 132 (2d Cir.), *cert. denied*, 434 U.S. 925 (1977). This fact was correctly recognized by the district court when it refused to charge the jury on the issue of good faith reliance. *Id.* Conversations between an outside firm and its attorneys concerning the transaction of business with SGS was also properly excluded for similar reasons.

The district court's refusal to admit the testimony of more than two expert defense witnesses constituted proper management of the case.

John Lane's tape recordings of his conversations with appellant Orchard concerning some of the transactions at issue herein did not fall under the ban of 18 U.S.C.

§ 2511(2)(d) as having been made "for the purpose of committing any criminal or tortious act." Lane's purpose in making the recording was simply to protect the interests of his own firm should SFI and SGS attempt to breach their contract. *See Moore v. Telfon Communications Corp.*, 589 F.2d 959, 965-66 (9th Cir 1978).

There is no substance in appellant's claims of prosecutorial misconduct. Information reported in the press was available in most instances from public proceedings and reported decisions. *See, e.g., In re SGS*, 530 F. Supp. 793 (S.D.N.Y.), *appeal dismissed* (2d Cir.), *cert. denied*, 456 U.S. 977 (1982); *In re Grand Jury Subpoenas Addressed to SFI*, 553 F. Supp. 71 (S.D.N.Y.), *aff'd mem.*, 714 F.2d 113 (2d Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983). Appellants have not shown that any non-public information was released in such a manner as to have improperly influenced the jurors.

Appellants' *Brady* claim lacks merit. Appellants had full knowledge of the persons whose statements are at issue and the information available to those persons and thus were in a position themselves to call the witnesses and to take advantage of any exculpatory testimony they might furnish. *United States v. LeRoy*, 687 F.2d 610, 618-19 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983).

The district court did not err in concluding that the Government's rebuttal summation was properly based on the record. To the extent, if any, that the prosecutor suggested any inferences not fully supported by the evidence, in view of the overwhelming proof of appellants' active and knowing participation in the fraudulent tax scheme, such transgression as may have occurred was harmless.

We reject appellant Antonucci's contention that he could not have been a participant in a conspiracy that involved fraud by both SFI and SGS, because he left SFI before SGS was formed. The district court properly instructed, *United States v. Tramunti*, 513 F.2d 1087, 1107 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975), and left to the jury, *United States v. Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), *cert. denied*, 104 S. Ct. 134 (1983), the question whether the evidence established a single conspiracy. The proof, which showed a substantial intermingling of SFI and SGS operations and employees, was sufficient to support the jury's determination that only a single conspiracy existed. The jury was instructed to disregard evidence concerning SGS in determining Antonucci's guilt, and can be presumed to have followed those instructions absent any showing to the contrary, *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 367 (1963).

Antonucci also fails in his contention that, because he resides outside the Southern District of New York and the customers whom he is charged with aiding and assisting filed their tax returns by mail, he was entitled to be tried in the district of his residence. *See* 18 U.S.C. § 3237(b). The district court correctly denied Antonucci's request for change of venue, relying on *In re United States (Clemente)*, 608 F.2d 76 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980), which held that section 3237(b) applies only where, unlike here, venue is predicated on the use of the mails.

The jury's verdict was properly rendered. Six days after beginning deliberations, the jury passed a note to the court stating that it could not reach a unanimous verdict. After informing counsel that he was prepared to take a partial verdict and receiving no objection, Judge Owen asked the jury whether they had reached a verdict

on any count. The foreman asked for more time to deliberate, because the jury was making progress. Later that day, the jury sent a note stating that it had reached unanimous decision on some counts but not others and that further deliberations would not prove effective. The jury was called into court, the verdict was read, and the jurors were polled.

It is well established that a jury may be allowed to return a partial verdict as to some defendants or some counts. *United States v. Cotter,* 60 F.2d 689 (2d Cir.), *cert. denied*, 287 U.S. 666 (1932); Fed. R. Crim. P. 31(b). Nothing in the instant case indicates that the jury's partial verdict was intended to be anything but final, and the district court correctly treated it as such. Although the jury later inquired whether each of the counts should be judged collectively or individually, this does not indicate that the jury was reassessing appellants' guilt on the counts already decided. Likewise, the note from a juror indicating that she had felt pressured and had changed her convictions, furnishes no basis to challenge the unanimously rendered partial verdict. *United States v. Hockridge*, 573 F.2d 752, 756-60 (2d Cir.), *cert. denied*, 435 U.S. 821 (1978).

Appellant Michael Senft's contention that, in fixing his sentence, the district court impermissibly considered his protestations of innocence throughout the trial, is meritless. The court's statement upon sentencing, on which appellant relies, merely expressed regret at Senft's apparent lack of remorse, a valid sentencing criterion. *United States v. Grayson*, 438 U.S. 41 (1978).

We have fully considered all of appellants' contentions, including any not discussed in the above paragraphs, and find no merit in any of them. The judgments of conviction are affirmed. Mandate shall issue forthwith.

/s/ WM. H. TIMBERS

HON. WILLIAM H. TIMBERS

/s/ ELLSWORTH A. VAN GRAAFEILAND

HON. ELLSWORTH A. VAN GRAAFEILAND

/s/ LAWRENCE PIERCE

HON. LAWRENCE W. PIERCE

N.P. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX E

THE STATUTES, RULES AND REGULATIONS THE CASE INVOLVES

FEDERAL RULES:

Federal Rule of Civil Procedure 26(b)(3)

> (3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. . . .

Federal Rule of Evidence 501

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts

of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

CALIFORNIA STATUTES:

California Corporations Code § 25102(f) (West 1977), *amended by* 1981 Cal. Stat., ch. 1120, § 1 (effective Nov. 1, 1981)

The following transactions are exempted from the provisions of Section 25110:

* * *

(f) Any offer or sale, in a transaction not involving any public offering, of any bona fide general partnership, joint venture or limited partnership interest, or any beneficial interest in a trust which is a "security" within the meaning of Section 25019, if in the case of such beneficial trust interests immediately after the sale and issuance they are owned by no more than five persons.

California Corporations Code § 25110 (West 1977)

It is unlawful for any person to offer or sell in this state any security in an issuer transaction (other than in a transaction subject to Section 25120), whether or not by or through underwriters, unless such sale has been qualified under Section 25111, 25112 or 25113 (and no order under Section 25140 or subdivision (a) of Section 25143 is in effect with respect to such qualification) or unless such security

or transaction is exempted under Chapter 1 (commencing with Section 25100) of this part.

California Corporations Code § 25504 (West 1977)

Every person who directly or indirectly controls a person liable under Section 25501 or 25503, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.

California Corporations Code § 25504.1 (West Supp. 1987)

Any person who materially assists in any violation of Section 25110, 25120, 25130, 25133, or 25401, or a condition of qualification under Chapter 2 (commencing with Section 25110) of Part 2 of this division imposed pursuant to Section 25141, or a condition of qualification under Chapter 3 (commencing with Section 25120) of Part 2 of this division imposed pursuant to Section 25141, or an order suspending trading issued pursuant to Section 25219, with intent to deceive or defraud, is jointly and severally liable with any other person liable under this chapter for such violation.

CALIFORNIA ADMINISTRATIVE CODE:

10 Cal. Admin. Code § 260.102.2 (1980)
(amended effective Nov. 1, 1981)

For the purposes of Subdivisions (e) and (g) of Section 25102 and Subdivision (a) of Section 25104 of the Code, an offer or sale, and for the purposes of Subdivision (f) of Section 25102, an offer or sale of any bona fide general partnership, joint venture or limited partnership interest, does not involve any public offering if offers are not made to more than 25 persons and sales are not consummated to more than 10 of such persons, and if all of the offerees either have a preexisting personal or business relationship with the offeror or its partners, officers, directors or controlling persons or by reason of their business or financial experience could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction. The number of offerees and purchasers referred to above is exclusive of any described in subdivision (i) of Section 25102 of the Code and a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person. This section does not create any presumption that a public offering is involved in offers not conforming to this section, and the determination of whether or not a transaction not covered by this section involves a public offering shall be made without reference to this section.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 18, 1986, I served the within Brief In Opposition to Petition for a Writ of Certiorari in re: "Cadwalader, Wickersham & Taft vs. United States District Court of the Central District of California" in the United States Supreme Court, October Term 1986, No. 86-1639;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

The Honorable Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

The Honorable William D. Keller
United States District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012

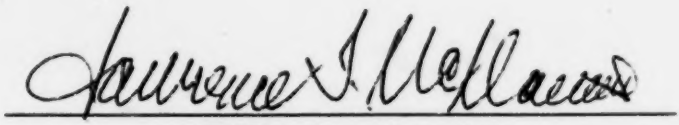
The Honorable Erwin N. Griswold
Jones, Day, Reavis & Pogue
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701

Susan L. Hoffman, Esq.
Tuttle & Taylor
355 South Grand Avenue
Los Angeles, California 90071

All Parties Required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 18, 1987, at Los Angeles, California



LAWRENCE T. McMANUS

No. 86-1636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Nominal Respondent,

- and -

DANIEL M. GOTTLIEB,
Real Party in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner Cadwalader, Wickersham & Taft ("Cadwalader") respectfully submits this Reply Brief in further support of its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

In his brief, third-party defendant and real party in interest Daniel M. Gottlieb ("Gottlieb")[1] argues basically

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[1] Gottlieb's brief purports to be submitted on behalf of himself and plaintiff Allan Carr ("Carr"). Yet, the document request and

two points: (1) that the issues presented by Cadwalader's petition are not properly before this Court, and (2) that the decision of the court below was not clearly erroneous. Both arguments are without merit.

I

CADWALADER'S CLAIMS OF PRIVILEGE ARE PROPERLY BEFORE THIS COURT AND WARRANT THE ISSUANCE OF MANDAMUS

Gottlieb argues that discovery orders involving claims of privilege enjoy no special status in considering an application for a writ of mandamus. Yet, the law is clear that mandamus should issue where, as here, the petitioner shows that an order will escape effective appellate review at a later date and disclosure involves questions of substantial importance to the administration of justice. *Barclaysamerican Corp.* v. *Kane*, 746 F.2d 653, 655 (10th Cir. 1984); *Bogosian* v. *Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984) (and cases cited therein); *Heathman* v. *United States District Court for the Central District of California*, 503 F.2d 1032, 1033 (9th Cir. 1974). *See Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964). In cases involving privilege, disclosure generally makes meaningful review impossible at a later date because after disclosure the privilege is irretrievably lost. *United States* v. *West*, 672 F.2d 796, 799 (10th Cir.), *cert. denied*, 457 U.S. 1133 (1982); *Jenkins* v. *Weinshienk*, 670 F.2d 915, 917 (10th Cir. 1982); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970),

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the motion to compel at issue were filed on behalf of *Gottlieb*, and Gottlieb alone. Notwithstanding his relationship to Carr, Gottlieb is himself a third-party defendant in this action. Hence, it is Gottlieb's right to these documents which is at issue in this proceeding. Any claimed right of *Carr* to the documents was never raised in or addressed by the court below and is not properly before this Court. *See United States* v. *Robertson*, 706 F.2d 253, 255 (8th Cir. 1983).

aff'd per curiam, 400 U.S. 348 (1971); *Bogosian* v. *Gulf Oil Corp., supra.* Important questions are raised in this case regarding the scope of the attorney-client privilege in civil litigation following a criminal conviction.

Gottlieb next argues that Cadwalader's claim of privilege should not be considered by this Court because Cadwalader did not submit an index of the documents as to which privilege was asserted and because it did not actually deliver the documents for inspection by the lower court *in camera.* On the latter point, the record is clear that Cadwalader offered the documents to the district court for inspection. *See* Petition at 5 n.2; Brief In Opposition at 24.

Under the circumstances of this case, an index was unnecessary and Cadwalader's failure to provide such an index clearly was not the basis asserted by either the magistrate or the district court for determining that the documents were not privileged. *See* Petition, Appendix A & C. Neither the Federal Rules of Civil Procedure nor the Local Rules for the Central District of California require an index or other specific identification of privileged documents before a privilege can properly be asserted. *See* Fed. R. Civ P. 34. The purpose of a list of privileged documents is to provide the court with sufficient information from which it can reasonably conclude whether or not a privilege applies, *i.e.*, that the communication involved legal advice between a client and his attorney. *Coastal Corp.* v. *Duncan*, 86 F.R.D. 514, 521 (D. Del. 1980); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1223 (9th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982).

As this Court noted in *Kerr* v. *United States District Court for the Northern District of California*, 426 U.S. 394, 400 (1976), the party claiming a privilege must merely specify which "documents or *class of documents* are privileged" (emphasis added). Gottlieb requested

whole classes of documents which were prima facie privileged including, for example, all documents containing communication between Senft and Cadwalader (Request Nos. 1, 2, 3) and all documents reflecting representations made by Sentinel to Cadwalader in connection with the preparation of the Private Placement Memorandum (Request No. 23). It requires no identification of specific documents to conclude that these requests call for production of a *class* of privileged documents reflecting communication between an attorney and his client relating to legal advice.[2]

Even the cases relied upon by Gottlieb do not require a listing of documents where documents are sought from an attorney and involve communications with the attorney's client. *See Federal Trade Commission* v. *Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980); *In re Shopping Carts Antitrust Litigation*, 95 F.R.D. 299, 306 (S.D.N.Y. 1982) ("it must be remembered that these interrogatories were directed at the corporate defendants and not to their attorneys"). In *Securities & Exchange Commission* v. *Dresser Industries, Inc.*, 453 F. Supp. 573 (D. D.C. 1978), *aff'd*, 628 F.2d 1368 (D.C. Cir), *cert. denied*, 449 U.S. 993 (1980), and *AM International, Inc.* v. *East-*

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[2] In circumstances involving a discovery request to an attorney, courts have noted that requiring an index with date and subject matter may defeat the purpose of the privilege, by requiring the disclosure of confidential information, such as the general nature of the communication or when an attorney and a client consulted about a given matter. *See Deering Milliken Research Corp.* v. *Tex-Elastic Corp.*, 320 F. Supp. 806, 809 (D. So. Car. 1970); *Stix Products, Inc.* v. *United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 339 (S.D.N.Y. 1969) (rejecting need for index). In circumstances where an index may itself reveal privileged information, *in camera* review by the court becomes particularly important, *id.*, *United States* v. *Tratner*, 511 F.2d 248, 252 (7th Cir. 1975), and submission of the documents *in camera* rather than an index is the appropriate procedure following a blanket claim of privilege. *See In re Special September 1983 Grand Jury*, 608 F. Supp. 538, 542 (S.D. Ind.), *aff'd*, 776 F.2d 628 (7th Cir. 1985).

man Kodak Co., 100 F.R.D. 255, 257 (N.D. Ill. 1981), also cited by Gottlieb, the courts rejected a blanket assertion of privilege because the corporate witness (not an attorney) had failed to show that any specific materials were subject to privilege or that the materials were generated for the purpose of securing legal advice. Even the index discussed in *United States* v. *Exxon Corp.*, 87 F.R.D. 624, 637 (D. D.C. 1980), relied upon by Gottlieb, required only the source of communication, whether the communication occurred in confidence and whether the source was an attorney. There is no dispute that each of the categories or classes of documents at issue here were confidential communications to or from an attorney.

In sum, the claims of privilege were properly asserted by Cadwalader in the district court.

II

THE DECISION OF THE DISTRICT COURT WAS CLEARLY ERRONEOUS

The decisions of the magistrate and the district court were as clear and unambiguous as they were erroneous. The magistrate concluded that the Cadwalader documents requested by Gottlieb must be produced, even though privileged, simply because they appeared relevant and Gottlieb had a need for them. This was plainly error. The district court did not address these conclusions but instead found that the crime-fraud and joint-client exceptions abrogated any privilege. On the record and the law this was equally incorrect. Moreover, neither court reviewed these documents *in camera*, notwithstanding the offer by Cadwalader to make them available.[3]

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[3] Contrary to Gottlieb's assertions (Brief in Opposition at 6 n.3) at no point did Cadwalader refuse to make any or all of the privileged documents available for review by the magistrate or the district court. *See also* p. 3, *supra*.

A. The District Court Erred When It Failed To Examine The Documents In Camera

Gottlieb ignores the decisions of this Court and of at least four circuits which establish that the district court should have reviewed the documents *in camera* before authorizing their disclosure. Petition at 7-11. Rather, he relies on a series of cases which are inapposite.

Renfield Corp. v. *E. Remy Martin & Co.*, 98 F.R.D. 442, 445 (D. Del. 1982) holds only that a party *opposing* a claim of privilege has no right to an *in camera* inspection where the party asserting privilege files an unrebutted affidavit setting forth the facts establishing the privilege. Clearly, that case is of no import here. Similarly, *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984), holds that a court need not examine *in camera* documents as to which the state secrets privilege is asserted before determining that documents should *not* be disclosed. Neither of these cases contradicts the authorities holding that *in camera* review should be undertaken prior to disclosure of documents as to which the attorney-client privilege is asserted. *See* Petition at 7-11.

B. The Crime-Fraud Exception Was Incorrectly Applied

In arguing that the district court properly applied the crime-fraud exception, Gottlieb ignores the numerous and uniform authorities which establish that a party seeking to rely on the crime-fraud exception must satisfy both parts of a two-pronged test, demonstrating: (1) that there is prima facie evidence that a crime or fraud has been committed, *and* (2) that the attorney was consulted in furtherance of that crime or fraud. Petition at 13-14.

Gottlieb's argument focuses on the purported prima facie evidence that a crime was committed by SGS and Senft. He continues to ignore the point that, even if a

crime was committed relating to SGS, there was no evidence that Cadwalader was consulted to further that crime. Unless this requirement is satisfied, the crime-fraud exception is inapplicable. *See In re International Systems and Controls Corporation Securities Litigation*, 693 F.2d 1235, 1242 (5th Cir. 1982); *accord In re John Doe Corp.*, 675 F.2d 482, 491 (2d Cir. 1982).

As to the first element of the test, Gottlieb's reliance on Senft's conviction on the conspiracy count of the indictment is misplaced. *See* Petition at 14-15. Gottlieb notes that Joseph Antonucci, a defendant in the criminal case, sought to have his conviction on the conspiracy count overturned because *he left SFI before SGS was formed.* The Second Circuit in *United States* v. *Senft* affirmed Antonucci's conviction on the conspiracy count, concluding that the evidence was sufficient to support a jury determination that a *single* conspiracy existed. Contrary to Gottlieb's argument, this ruling does not require the conclusion that a crime relating to SGS was committed. Rather, the Second Circuit's opinion compels the conclusion that the only conspiracy the jury reasonably could have found on Count 1 of the Indictment related to SFI, and not to SGS. *See* Brief in Opposition, Appendix D. The Second Circuit noted that the jury was instructed to *disregard* evidence concerning SGS in determining Antonucci's guilt. Brief in Opposition, Appendix D at 19a.

Thus, the only conclusion that can be reached from Antonucci's conviction on the conspiracy count by a jury instructed not to consider any evidence relating to SGS, is that the jury found that Antonucci was part of a single conspiracy involving *SFI—not SGS.*[4] Brief in Opposition at 6; Petition at 2-3. Thus, there was no basis

[4] As previously shown (Petition at 3), this view of the jury's verdict is also supported by the fact that there was no conviction on *any* count relating to the SGS limited partners, including the one relating to Carr's investment.

for the conclusion below that the conspiracy conviction necessarily involved a finding of a crime relating to SGS.

In his brief to this Court, Gottlieb raises for the first time a claim that he has made a prima facie showing of a crime or fraud because SGS offered 150 limited partnership interests for sale within California without qualifying them, as plaintiff claims was required by Section 25110 of the California Corporations Code. This belated proffer of a different "fraud," devoid of evidence or citation in the record to establish it, is not a prima facie showing. It was never raised in the courts below and is certainly not so "plain or apparent" as to warrant this Court's consideration. *New York Dock Co.* v. *Steamship Poznan*, 274 U.S. 117, 123 (1927).[5] In this case, neither Gottlieb (nor Carr) is maintaining any action on behalf of the partnership, nor were they acting as trustees for the partnership. *See Weil* v. *Investment Indicators, Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981) (*Garner* inapplicable where shareholder action is not a derivative suit).

Gottlieb contends that no citation of authority is necessary to apply this inapplicable theory to this action involving a limited partner's attempt to obtain disclosure of privileged communication between the general partner, the partnership and its counsel. No authority is offered because none is available. Moreover, the rationale of *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), has been rejected by at least one court which noted that the so-called share-

[5] Relying on *In re Sentinel Financial Instruments*, 553 F. Supp. 71, 76 (S.D.N.Y.), *aff'd mem.*, 714 F.2d 113 (2d Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983) and *In re Sentinel Government Securities*, 530 F. Supp. 793 (S.D.N.Y.), *petition for mandamus denied*, 697 F.2d (2d Cir.) *cert. denied*, 456 U.S. 977 (1982), Gottlieb urges that privilege claims similar to those asserted by Cadwalader were rejected in the criminal case. Neither of those decisions discuss the crime-fraud exception and in neither of those actions were documents of Cadwalader at issue.

holder/fiduciary exception may undercut the very purpose of the privilege and lead to less, rather than more, open disclosure:

> The *Garner* problem is perhaps that the shareholder or other owed a duty of trust becomes too readily and artificially recognized as the "client" for purposes of privilege.
>
> Although corporate management is expected to act ultimately for the shareholder's benefit, a hasty resort to *Garner* concepts will confuse who corporate counsel's clients realistically are, and ignore the genuine need of management in the ordinary course for confidential communication and advice.

Shirvani v. *Capital Investing Corp., Inc.*, 112 F.R.D. 389, 390-91 (D. Conn. 1986).

C. The Joint-Client Exception is Inapplicable

Cadwalader has demonstrated that the so-called joint-client exception relied upon by the district court did not justify disclosure because Gottlieb was never a client of Cadwalader. Cadwalader has also shown that Carr, as a limited partner, was not in any confidential relationship with Cadwalader or the partnership. Petition at 11-12. Gottlieb now argues that the attorney-client privilege is inapplicable when suit is brought against a fiduciary.

This argument is equally inapplicable to any attempt by Gottlieb to obtain documents. Gottlieb was not a partner in SGS and neither the partnership nor Cadwalader owed him any fiduciary duty. In addition, none of the cases relied upon by Gottlieb relate, even remotely, to a situation such as this, where a limited partner has brought an action against the general partner, the partnership and the partnership's attorney. The majority of cases adopting the exception now urged by Gottlieb, (which has never been recognized by this Court). applied it in shareholder derivative actions, where the shareholder sued on behalf of the corporation possessing the

privilege, or where the attorney was representing a trustee of an employee benefit plan.[6]

CONCLUSION

A writ of certiorari should be granted to review the decision of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,

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[6] *See Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Panter* v. *Marshall Field & Co.*, 80 F.R.D. 718 (N.D. Ill. 1978); *Broad* v. *Rockwell International Corp.*, [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex. 1977) (corporation's communication with its attorney available in shareholder derivative action upon showing of good cause); *Valente* v. *Pepsico, Inc.*, 68 F.R.D. 361 (D. Del. 1975); *Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Co.*, 543 F. Supp. 906, 909 (D. D.C. 1982) (attorney's communication with trustee of employee benefit plan not privileged because the trustee was acting solely for the beneficiaries).